92-1549

Supreme Court, U.S.
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NO. 92 - _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

CONNIE RESHARD and LEROY RESHARD,

PETITIONERS,

VERSUS

DR. EARL BRITT, DR. GEORGE BONK,
DR. DAVID MOORE, DR. PANKAJ CHOKHAWALA,
TALLAHASSEE MEDICAL CENTER, INC.
d.b.a., TALLAHASSEE COMMUNITY HOSPITAL,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Whether dismissal of wrongful death action under Rule 16(f), Rule 37(b)(2), and Rule 41 (b), Fed. R.Civ. P. for alleged discovery abuses, violated due process of law because the other side committed discovery abuses, destroyed and concealed material evidence before and during course of litigation, including the heart and ruptured aorta which caused the death of the decedent, because material evidence was excluded and because plaintiffs did not abuse discovery.

2. Whether the order of dismissal was a final order under 28 U.S.C. § 1291 and Rule 4 of the Federal Rules of Appellate Procedure because a Rule 59(e) motion for reconsideration was still pending before the magistrate judge under 28 U.S.C. § 636(b)(1)(A), (B), and (C).

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2A Moore's Federal Practice, paragraph 11.01[4]

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TO THE HONORABLE SUPREME COURT:

Connie Reshard and Leroy Reshard, petitioners file this petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit was issued on September 30, 1992, No. 92-3542 (TJOFLAT, Chief Judge, KRAVITCH and HATCHETT, Associate Judges). The order affirmed the dismissal of the case with prejudice for alleged violations of discovery. It is unreported and produced in the Appendix. App. at 1-4).

The court of appeals denied rehearing by the Panel and suggestion of en banc review on December 23, 1992. App. at 5. Petitioners sought a stay of mandate, pending application for a writ of

certiorari on January 5, 1993. It was denied on February 26, 1993. App. at 7. The order issued as the mandate on February 26, 1993 is different from the order issued on September 30, 1992. Both versions are provided. Appellant's Motion to Settle the Record under Rule 10, Fed.R.App.P. was denied on September 30, 1992. App. at 5-7.

On May 6, 1991, the United States District Court for the Northern District of Florida, Tallahassee Division entered an order adopting a Order, Report and Recommendation by Magistrate Judge William Sherrill. The order dismissed the action with prejudice pursuant to Rules 16(f), 41(b), and 37(b)(2), Fed.R.Civ.P. for alleged discovery violations, No. 85-7216-ws. (WILLIAM STAFFORD, Chief Judge). The order also awarded cost and attorney

fees to defendants, for the alleged discovery violations. App. at 7-13.

The Order, Report and Recommendation which dismissed the case was filed on December 14, 1990. (WILLIAM SHERRILL, Magistrate Judge). App. at 15-105.

JURISDICTIONAL STATEMENT

This court's jurisdiction to review the United States Court of Appeals for the Eleventh Circuit Order of September 30, 1992 is invoked pursuant to 28 U.S.C.A. § 1254.

Section 1291, Title 28 of the United States Code was invoked for jurisdiction before the United States Court of Appeals for the Eleventh Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION:

AMENDMENT V READS:

No person shall . . . be deprived of

life, liberty or property, without due process of law . . . .

AMENDMENT XIV READS:

[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

FEDERAL STATUTES:

28 U.S.C.A. § 636 App. at

28 U.S.C. § 753(b) App. at

28 U.S.C.A. § 1254 App. at

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Florida Wrongful Death Statute, § 768.16 et seq., App. at 156

STATEMENT OF CASE

This is a wrongful death case under a theory of medical malpractice. It was filed on July 29, 1985 in the United

States District Court for the Northern District of Florida, Tallahassee Division, under the diversity of citizenship subject matter jurisdiction, pursuant to section 1332, Title 28 of the United States Code. (R1-1-2).[1]

Florida Wrongful Death Statute, Fla Stat. § 768 et seq. authorizes compensatory and punitive damages on behalf of the estate and certain survivors. App. at Plaintiffs complied with the provisions and stated that the gross and wilful negligence of the defendants was the cause of the death of Minnie Lee Reshard, the decedent. The Defendants are Dr. Earl Britt, Dr. George Bonk, Dr. Pankaj Chokhawala, Dr. David

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[1] The Eleventh Circuit reviews cases on the original record and the citations so noted apply herein. (R volume - doc. - page number).

Moore, Tallahassee Medical Center, Inc. d.b.a., Tallahassee Community Hospital (Hereafter "TCH"), and Tallahassee Memorial Regional Medical Center (Hereafter "TMRMC"). TMRMC was dismissed as a party on January 30, 1986.

About 4 A.M. on August 2, 1983, decedent was awaken with severe pain in the upper chest, which spread to her arms and legs. She was taken to TCH Hospital but did not see a doctor for more than 4 hours.

On August 2, 1983, a set of chest x-rays were taken and read by Dr. Britt and the radiologist, Dr. Bonk. Dr. Britt then ordered a second set of chest x-rays that same day. Both certified the chest x-rays as normal. However, the chest x-rays are

clearly abnormal[2] and show evidence of an acute aneurysm, a life threatening condition, which required immediate surgery. (R7-281) (R9-347) (R8-321) (Affidavits by Dr. Reginald Peniston[3] and

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[2] A dissecting aneurysm causes the aorta to widen, and its presence can be detected on a plain chest x-ray in 90 percent of patients. Robert Berkow, Md., The Merck Manual, Merck Research Laboratories, Rahway, J.J., 1992, Chp. 27, p. 573, ¶ 4.

[3] "I was shown a chest x-ray [of the decedent] and asked if I thought it was normal. I replied that it did not look normal to me and further that if the patient had chest pains, that further testing was required . . . I showed the x-ray[s] to two separate radiologists with the statement that this was a patient with chest pains. Both radiologists found x-rays worrisome and abnormal regarding the aortic silhouette and freely offered the possibility of aortic dissection . . . If these x-rays had been interpreted with a greater degree of clinical suspicion, then a CT scan of the chest or an anteriogram would have been performed promptly and surgery would have been performed. The chance of survival would have been about seventy (70) percent . . .Since the patient had recurrent chest pains while

Dr. Childress).

TCH was not equipped to perform the surgery and should have transferred the decedent to TMRMC, but did not. Under its operating procedures, TCH allowed Dr. Bonk to read the chest x-rays taken in the TCH emergency room on August 2, 1983 several days later.[4] An aortic dissection in the ascending aorta is a life threatening emergency which is exacerbated by unregulated blood pressure which can and did lead to rupture of the aorta, allowing

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hospitalized and since the physicians were convinced that she had a neuropsychiatric problem they did not even entertain the diagnosis of dissecting aneurysm . . . ." Dr. Reginald Peniston, Thoracic surgeon.

[4] TCH's culpability can be determined from provisions of the Joint Commission on Accreditation of Health care Organizations (JCAH) and Florida Statute 395.002 et seq. (App. at 147-152). Hospitals are required to maintain certain operating procedures applicable to its conduct with the decedent.

blood to flow back down into the heart sac (pericardium), thus, causing death by cardiac tamponade. A nurse found the decedent dead sometime on the morning of August 6, 1983.

With proper diagnosis and surgery the decedent's chance of survival was 70 percent. Without surgery, rupture leads to death 90-95 percent of untreated patients.

Despite the decedent's clinical history of hypertension, dating from 1969 and treatment for hypertension by Dr. Britt personally beginning in 1978, he virtually ignored the cardio complaint and treated her for depression. Dr. Britt had prescribed the decedent 160 mg. of Inderal per day for hypertension. Still by noon on August 2, 1983, Dr. Britt called in Dr. Chokhawala, a psychiatrist. Dr.

Chokhawala administered a potent antidepressant, desyrel, which enhanced the risk of death from the rupture of the aneurysm. During an aorta dissection, unregulated blood pressure can lead to rupture of the ascending aorta that the decedent experienced.

Further, since 1980 Defendant David Moore had been administering two potent antidepressants, pamelor and prolixin, which caused unstable blood pressure management, according to established medical literature and reports obtained from the Food and Drug Administration in 1986.[5] (R9-341-3-7).

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[5] Modern Drug Encyclopedia, York Medical Books, Technical Publishers, 1981, pp. 744, 752; Physicians Desk Reference (PDR), Medical Economics Co. Inc., Oradell, N.J., 44 ed. 1990; Gordy and gray, Attorney's Textbook of Medicine, Vol. 3A, 3rd ed. M. Binder (1973) ¶ 76.11; see also diagnostic 7 Statistical Manual of Mental Disorders (DSM-III-R), 3rd ed.

These drugs are contraindicated for hypertension. Hypertension causes the weakening of the aortic wall which leads to aneurysms.[6] Management of blood pressure is essential to prevent aneurysm for people not predisposed to them genetically as decedent had no genetic

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American Psychiatric Association, Wash., D.C. 1987; Psychiatric Peer Review, American Association (APA), Washington, D.C. The PDR is designated by the APA as a reasonable source for drug information since "substantial evidence" of drug effects is used for its information.

Dr. Michael Childress states: "The cardiac and aortic changes are suggestive of systemic hypertension." As a point of reference, a routine chest x-ray of the decedent, taken in February 1979, shows a normal size heart and silhouette. (R2-75)(records obtained from Dr. Britt and TMRMC).

[6] Dr. Michael Childress states: "The cardiac and aortic shanges are suggestive of systemic hypertension." As a point of reference, a routine chest x-ray of the decedent, taken in February 1979, shows a normal size heart and silhouette. (R2-75)(records obtained from Dr. Britt and TMRMC).

condition. The untreated aneurysm, the failure to move the decedent to TMRMC, and the administration of pamelor, prolixin and desyrel led to the death of decedent.

Dr. Jerry Harris, a State of Florida Medical Examiner performed an autopsy on August 7, 1983. Dr. Britt was present. Dr. Harris stated that the decedent had died of a rupture in the ascending aorta. He specially stated the damage was confined to a small section between the base of the aorta. Dr. Harris specifically stated, demonstrated by diagram and by model that the aneurysm had not reached the aortic arch. (App. at 166-167). The rupture was said to end in the ascending aorta.[7] This oral

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[7] This means that the later written autopsy report which states that the aneurysm extended into the aortic arch and down through the renal arteries (near the

kidneys) cannot be true. Dr. Harris cut the aorta open on August 7, 1983 while Connie and Leroy Reshard waited in the next room. We met with Dr. Harris and the other persons mentioned immediately after he conducted the autopsy. The decedent's body was removed by the mortician as we met that same day. A physical tear would either continue or end. Once it ended, the space immediately following the tear would be clear. This is no mistake. This was an attempt to make the decedent's condition appear worst than it actually was.

The autopsy report stated: "In the ascending aorta, approximately 1.5 cm. above the aortic valve, is an irregular linear horizontal tear which extends approximately 50% of the circumference of the vessel. Beneath the tear there is a dissection of the outer 1/3 of the aorta from the inner 2/3. This dissection extends proximally to the pericardia sac and distally involves the entire thoracic aorta and abdominal aorta down below the renal arteries." Dr. Jerry Harris, State of Florida Medical Examiner, 9/16/83. (R7-281-Attachment I at 2).

Dr. Michael Childress, the radiologist expert for Petitioners, statement supports the fact that the aneurysm was confined to the ascending aorta. Please note the underlined portions of the report.

Portable Exam: The patient is rotated

explanation was given by Dr. Harris and Dr. Britt to Connie and Leroy Reshard in the presence of two TCH personnel, Virginia Shepard and Zippy Doyle on August 7, 1983 and by Dr. Harris alone on August

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toward the left posterior oblique position. The ectatic and unfolded aorta appears to be associated with enlargement of the cardiac silhouette. The descending aorta is indistinct but this could be related to technique. A full inspiration was not obtained.

Routine Exam: The descending aorta appears distinct. The aortic dilation and unfolding displaces the trachea to the right. The paratracheal shadows are prominent which could be related to ectatic brachiocephalic vessels or thyroid enlargement. No pleural fluid or parenchymal consolidation identifiable. The cardiac and aortic changes are suggestive of systemic hypertension.

Impression: Ectasia and unfolding of the aorta are associated with enlargement of the cardiac silhouette and probable left ventricular enlargement. The appearance of the aorta is consistent with and suggestive of aortic dissection, especially chronic. The cardiac and aortic changes suggest the possibility of systemic hypertension.

12, 1983. A drawing was made by Dr. Harris which illustrated the small area of the dissection just above the heart. These facts clearly establish that the aneurysm did not continue down near the kidneys, via the renal arteries. This documentation was submitted into evidence on August 3, 1990. (R7-281).

At August 7th meeting, the Reshards were told by Dr. Britt that the aneurysm could not be detected from the chest x-rays that were taken, that there was no basis for further diagnostic test, and that she would have died inspite of surgery because only about 30 percent of the patients survive with surgery. Clear medical evidence indicate that none of the statements were true.

During the second meeting with Dr. Harris, the mortician, and the Reshards --

Leroy, Connie and James, the mortician told the Reshards that the heart and upper portion (the aorta) had been removed. Dr. Harris repeated the same set of facts in the earlier meeting. The Reshard's confronted him about the removal of the decedent's heart. Dr. Harris acknowledged that he had removed it and had it in his possession. However, he would not even allow the Reshard's to see it.

The decedent's records began to disappear after Leroy and Connie Reshard consulted a lawyer the week of August 15, 1983.[8]

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[8] We asked Elwin Thrasher, the attorney we consulted to evaluate the case for medical malpractice and to contact Dr. Harris about obtaining the autopsy. A typewritten clinical resume containing the diagnosis and prognosis of the decedent, which had been prepared by Dr. Chokhawala during the decedent's stay at TCH was given to and discussed with Thrasher. An original medical sheet (not from TCH) but prepared by Dr. Britt prior to the

In an effort to prepare Plaintiffs' expert medical witnesses in July 1990, Dr. Harris was subpoenaed to produce the heart and aorta. He then stated that TCH had everything he had conducted regarding the case. (R7-281- Affidavits F-G). Shortly thereafter all discovery was stayed. (R7-276).

When James Reshard obtained decedent's x-rays from TCH in July 1984, the envelope which was labeled thyroid Scan was empty. (R4-183-Exhibits). The

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decedent's death was also given to Elwin Thrasher. He did not return these documents and we later learned that they were no longer in the TCH's records on the decedent or in Dr. Britt's files on the decedent. When the autopsy report was issued in September 1983, it now stated that the aneurysm was so extensive, moving from the base of the aorta through the aortic arch and down to the renal arteries near the kidneys. The fact that the heart was removed is not recorded in any of the documentation given to the Reshards before the case commenced or during discovery.

scan is a nuclear medicine picture similar to an x-ray film. See App. 197-199. The thyroid is located in the thoracic cavity and is visible from a plain chest x-ray. Dr. Bonk is the expert in nuclear medicine at TCH. See Affidavit by radiologist, Dr. Michael Childress. (Supra, Note no. 8). The chest x-ray envelope contained four (4) films, one of which did not complete the series of films. According to James Reshard, a person who works in radiology that he knows alerted him to the fact that the aneurysm can be detected from a plain chest x-ray. This was the reason he picked-up the chest x-rays in July 1984. Although Virginia Shepard of TCH had promised the Reshards the x-rays on August 7, 1983, she held them back when Leroy and James Reshard picked-up a copy of some of the hospital records of the

decedent on or about August 10, 1983 after making two trips to TCH. In front of the Reshards, Virginia Shepard selectively removed items from the file which were not given to the Reshards. (R7-281-Affidavits by Leroy (App. at 162-167) and James Reshard (App. at 178-179)).

No lawyer in the Tallahassee area would assist the Reshards. Not one of these lawyers ever asked to see the chest x-rays. Some were honest and said that they were a friend of Dr. Britt's; others were less forthright. Wadsworth and Davis was one of the lawyers consulted. Another law firm indicated an interest because it wanted to nail Dr. Britt, but declined further involvement because other doctors were also culpable. For these reasons, Plaintiffs proceeded pro se.

COURSE OF PROCEEDINGS

On September 8, 1986, Plaintiffs were disqualified from proceeding Pro Se. (R3-146). An appeal was taken. Reshard v. Britt, 819 F.2d 1573 (11th Cir. 1987), rev'd., vacated, 831 F.2d 222 (11th Cir. 1987), aff'd. on other grounds, 839 F.2d 1499 (11th Cir. 1988)(en banc)(court evenly divided).[9]

By Order on October 17, 1989, District Court Judge Stafford assigned all pretrial matters to Magistrate William Sherrill without the consent of the Parties, pursuant to 28 U.S.C. § 636 (b)(1)(A) et seq. (R4-171). App. at 107.

Before the appeal, supra, in 1986, several disputes involving discovery were

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[9] During the course of the appeal Connie Reshard became a lawyer. After the appeal, she moved to proceed in pro hac vice on June 9, 1988. Defendant Britt objected. The motion was granted on 11/8/88 (R4-165).

pending including Plaintiffs Motion to Disqualify Defense Counsel and for a Default Judgment (R2-116), as amended (R3-139). Connie Reshard and Lloyd Reshard had consulted with Wadsworth and Davis in April 1984 for about an hour and fifteen minutes. There was identity of issues, exchange of confidential information in detail , and an attorney-client relationship attached. Wadsworth and Davis disputed the account and denied that confidential information had been shared with them and other defense counsel, who in turn used the information to enhance their ability to frustrate plaintiffs' discovery. Magistrate Sherrill denied the Motion to Disqualify and based on the denial of the Motion, he denied the Default Judgment, and issued his findings in a Report and Recommendation on April

17, 1990. (R4-186). Plaintiffs filed objections. The district judge adopted the Magistrate's April 17, 1990 recommendation on August 13, 1990.

Discovery resumed under a new discovery order of April 17, 1990 - August 17, 1990. (R4-185). Defendants were authorized to schedule their discovery first by court order on April 12, 1990. (App. 105-106, See Rule 26(d), Fed.R.Civ.P. App. at 124 (R4-184). After a month, Defendants obtained court order to schedule the following depositions by August 17, 1990. Plaintiffs were ordered to permit discovery by oral deposition of Leroy and Connie Reshard, Rosa Walker-Virgil and Brenda Reshard.[10] Plaintiffs complied on

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[10] In August 1986, defendants first notice the taking of oral depositions of these persons and other witnesses some of

June 27 and 28, 1990. Plaintiffs had a Motion to Compel Discovery which was granted in part and denied in part on April 12, 1990. Specifically, Defendant TCH had denied that it had any other evidence when counsel William Davis knew that it had been given the decedent's heart and aorta. Despite presenting this new information to the district court, the court still refused to compel production of the evidence from TCH, pursuant to Plaintiffs' Motion to Compel. The district court ruled Plaintiffs Request of Production was defective despite

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whom were out of the state of Florida. No subpoenas were served in compliance with Rule 30(g)(2). App. at 130-131. Plaintiffs sought a protective order for their depositions under Rule 26(c) (App. at 122) and Rule 37(d) App at 144. Plaintiffs motion for protective order was denied and the magistrate judge ruled that they had no standing to complain about the lack of subpoenas despite Rule 30(g)(2).

Plaintiffs designation of Rule 34 and that copies of the documents regarding the thyroid scan, clinical resume, and other records of the decedent. In contrast, Plaintiffs were directed to produce for inspection in the law offices of defendants counsel in the same manner that Plaintiffs had requested production. Magistrate Judge Sherrill directed Plaintiffs to provide production by traditional means "or in the alternative, serve upon all defendants complete and readable copies, of all of the documents identified in request for production . . . ." (R4-184-4).

Without first receiving a court order for discovery of Plaintiffs experts under Rule 26(b)(4), Defendants sought a discovery conference on June 12, 1990. (R5-218). The Magistrate granted the

request and scheduled a conference on June 20, 1990, a date defense counsel had submitted but that Jeannette Andrews knew Connie Reshard was unavailable. (R5-220). Connie Reshard notified the court by express mail on June 18, 1990 with next day delivery of her unavailability, but it was not received until two days by U.S. Postal error, in order to record her objection and unavailability. The Magistrate proceeded in face of objections by Connie Reshard.

The Magistrate took this opportunity to relieve Defendants TCH and Dr. Chokhawala of the discovery abuses regarding the thyroid scan and clinical resume. In the April 17, 1990 Report and Recommendation (R4-186), the magistrate made no findings of fact regarding those issues. Now he would make findings of

fact on these issues in favor of the defendants, via general discovery order. A subsequent Motion to Quash and to Impose Rule 11 Sanctions on June 27, 1990 by the Plaintiffs was denied. (R5-228). Defendants notice of the taking of depositions of Dr. Taylor and Dr. Peniston which were scheduled for July 17 and 18, 1990 were defective and not in compliance with Rule 26(b)(4). (App. at 120-121).

Plaintiffs appealed to Judge Stafford under Rule 72(a) and 28 U.S.C. 636 of this series of Orders by the Magistrate on July 2, 1990 for the June 14 and 20, 1990 Orders (R5-223) and on July 16, 1990 for the June 27, 1990 Order (R6-252). When the depositions were scheduled, the appeals process was not complete and efforts to obtain the decedent's heart were delayed because defendant TCH had

concealed that it either had possession of the organ or had destroyed this vital piece of evidence. Other issues of destroyed or concealed evidence had also been the source of Motions to Compel and impose Sanctions under Rules 37(b)(2) and Rule 11 of the Fed R.Civ.P. None of the efforts to obtain discovery and sanctions by Plaintiffs were granted despite the obvious prejudicial error regarding the depositions of medical expert witnesses of the Plaintiffs and other evidence. Plaintiffs did not know the opinions or identity of experts to be used at trial by the Defendants even though such information had been requested in 1986, but no supplementation of interrogatories were made in compliance with Rule 26(e). (App. at 124) They were not compelled to disclose this information in open court on

June 29, 1990 regarding the Plaintiffs Motion to Quash the taking of depositions from its medical experts, even when Jeannette Andrews admitted that Defendants already had retained such experts and were consulting with them in preparation for the depositions. The correctness of the transcript of that proceeding is in dispute. (R14-257).[11] Production of the audio tapes will demonstrate the material alteration of the transcript and, thus, the assignment of wrongful conduct to the appropriate person(s).

Defendants obtained a deposition from Dr. Taylor, who falsely stated that he was not an expert for Plaintiffs. Dr.

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[11] Motion to Settle Record under Rule 10, Fed.R.App.P. was first denied without prejudice. App. at 5-7). Issue was mooted when court of appeals affirmed the dismissal of the case without first remanding it to correct the record.

Reginald Peniston, a thoracic surgeon was not deposed. On July 27, 1990, Ms. Andrews filed a Motion for sanctions and dismissal. (R6-270). All discovery was stayed and scheduled depositions by Plaintiffs of the Defendants and their witness list, were not taken, as of July 31, 1990. (R7-276).

The other Defendants either adopted the Motion for Sanctions and Dismissal or filed directly for the same or a Motion for Summary Judgment. A hearing was scheduled for November 8, 1990, but was cancelled due to the illness of Connie Reshard. Defendant counsel for Dr. Chokhawala, William Smith, filed a copy of the transcript of Connie Reshard's deposition even though she did not have actual receipt of its transcription and therefore had not reviewed it. (R15, 16-

301).

A hearing was held on December 6, 1990 in which the Magistrate denied all findings of fact regarding the destruction and concealment of evidence against Defendants, including a Rule 60, Fed. R.Civ. P. Motion by Plaintiffs to correct the previous findings of facts on these issues. App. at 30[12]He recommended that the case be dismissed because Plaintiffs failed to attend the depositions of Dr. Taylor and Dr. Peniston. He cited virtually every dispute in the case and found Connie Reshard at fault, when she had complied with the Court's orders.

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[12] See also discussion of Dr. Chokhawala's clinical summary resume at hearing on April 12, 1990. App. at 158-162. Connie Reshard always stated that there was a second document already typed which had been in the decedent's hospital records, in addition to the handwritten consultation report, the magistrate judge refers to.

Because the Motion for a Scheduling Conference was ordered by the Magistrate (R5-220) and the Motion to Quash the Subpoenas and Impose Rule 11 Sanction (R5-229) were wrongly decided, the failure to appear for the depositions were justified.

Other examples can be used to support that conclusion. Plaintiffs were ordered to return the decedent's x-rays to TCH even though the x-rays were in the possession and control of a nonparty. Despite the fact that Plaintiffs had not disobeyed the district court's order, the magistrate found that Connie Reshard had violated a court order in the December 14, 1990 Order. (R10-376). Although the Magistrate did not accept Connie Reshard's explanations, submission into evidence of the July 3, 1986 letter from Dr. Taylor documenting his retainment as an expert

witness, or the oral Motion for in-cameral inspection by the court only of further documentation contradicting Dr. Taylor's assertion that he was not an expert for plaintiffs, he found that Connie Reshard had not given truthful testimony about the Plaintiffs expert testimony from Dr. Taylor. Other evidence was excluded as well. An Order, Report and Recommendation of dismissal with prejudice was entered on December 14, 1990. (R10-376).

Plaintiffs filed a Motion for Reconsideration on December 27, 1990 (R10-378), but the Magistrate never acted on it. Thereafter, Judge Stafford ordered that the Motion be recast as Plaintiffs' objection under the appeal's process of Rule 72, Fed. R. Civ. P. and 28 U.S.C. 636. (R10-378). App. at 7-15. Plaintiffs adopted that Motion as its

objection because there was insufficient time to respond further in accordance with Rule 72(a) and (b), Fed.R.Civ.P. App. at 148. The case was dismissed pursuant to Rule 16(f), Rule 37(b)(2) and Rule 41(b) on May 6, 1991 by District Court Judge Stafford. The determination of the grant of attorneys fees and cost as a Sanction were assigned to the Magistrate. He stayed further proceedings on August 8, 1991. (R10-397). A Notice of Appeal under 28 U.S.C. 1291 was taken on June 4, 1991. (R10-417, 418).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Supreme Court should exercise its discretion and grant a writ of certiorari in this case because the Eleventh, Third,

Eight and Ninth Circuits are applying substantially different guidelines for discovery sanctions. This situation leads to uneven resolution of property rights and decisions which are for some litigants, unjust. Disputes arising in the area of discovery and pretrial case management is the most important stage of litigation and the most promising stage for settlement resolution, provided that dispute resolutions at this juncture are enforced fairly between the parties.

1. The Eleventh Circuit decision to affirm dismissal of this case under Rule 16(f), Rule 37(b)(2), and Rule 41(b) directly conflicts with the decision in Equal Employment Opportunity Comm'n. v. Carter Carburetor, 577 F.2d 43 (8th Cir. 1978), cert. denied, 439 U.S. 1081, 99 S.Ct. 865, 59 L.Ed.2d 52 (1979). That

court held that sanctions were inappropriate where discovery abuses could be assigned to both sides. Id at 48.

The Eleventh Circuit decision also conflicts with the disposition of sanctions for discovery infractions in the Ninth Circuit, Adriana International Corp. v. Thoeren, 913 F.2d 1406 (9th Cir. 1990); In re Rubin, 769 F.2d 611, 619 (9th Cir. 1985) (prior sanctions must be awarded first and requires specific warning of dismissal sanction first); Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1337-1339 (9th Cir. 1985) (answers to interrogatories incomplete, evasive, and false, but objections were not made in bad faith); United States v. National Medical Enterprises, 792 F.2d 906, 912 (9th Cir. 1986)(reversed because no clear warning of dismissal was given to the plaintiff).

Because the Order of Dismissal relied on Hicks v. Feeney, 850 F.2d 152, 156 (3rd Cir. 1988), the Third Circuit guidelines for resolving and applying discovery sanctions under Rule 37 is in conflict with the Ninth Circuit. App. at 93.

Neither is the decision consistent with the Supreme Court's rulings in Chambers v. NASCO, Inc., 111 S.Ct. 2123, 2132 (1991); Lytle v. Household Mfg., Inc., 494 U.S. 545, 110 S.Ct. 1331, 1338, 108 L.Ed.2d 504 (1990); Insurance Corp. of Ireland v. Compagnie des Bauxities de Guinee, 456 U.S. 694, 707, 102 S.Ct. 2099, 2106, 72 L.Ed.2d 492 (1982) (punitive dismissal of a lawsuit must be just).

2. Restriction of material evidence which would contradict certain factual findings and conclusions of law with respect to discovery abuses is

inconsistent with due process of law. Beech Aircraft Corp. v. Rainey, U.S. ,109 S.Ct. 439 (1988)

3. The order of dismissal was not a final order under 28 U.S.C. § 1291 because a Motion to Reconsider was still pending before the magistrate judge pursuant to authority granted under 28 U.S.C. § 636 (b)(1)(A), (B), and (C).

I. DISMISSAL OF WRONGFUL DEATH ACTION UNDER RULE 16(F), RULE 37(B)(2), AND RULE 41(B) FOR ALLEGED DISCOVERY ABUSES VIOLATES DUE PROCESS OF LAW.

There has been a failure of due process of law under the Fifth and Fourteenth Amendments. Before dismissing a case, the Court must demonstrate substantive and procedural due process of

law. Zubernibm et al. v. Burch, ___U.S. __, 110 S.Ct. 975 (1990); Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976); Boddie v. Connecticut, 401 U.S. 371, 374, 91 S.Ct. 780, 784 (1971).

"The basic thrust of the due process limitation is that any sanction which does not, at least in part, rest on a litigant's interest in amelioration of prejudice is a deprivation of property by the state, and therefore, certain protections should generally be required." Heiderscheit, Rule 37 Discovery Sanctions in the Ninth Circuit: The Collapse of the Deterrence Goal, 68 Ore.L.Rev. 57, 72-73 (1989);[13] See also, Hovey v. Elliott, 167

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[13] After the Supreme Court issued National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 7471 (1976), some scholars criticized the

U.S. 409 (1897); Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1341 (9th Cir. 1985).

In Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707, 102 S.Ct. 2099, 2106, 72 L.Ed.2d

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punitive approach on due process grounds. In a Note published in the Harvard Law Review, it was noted that punitive sanctions "[i]gnores or understates the problems of fairness in such a rule . . . For instance a requirement of a litigation-ending sanction would be inappropriate in cases where both parties are at fault; to punish one and not the other would be unfair . . . Relying on Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911), actual notice that a punitive sanction may be imposed, proof of wilful failure beyond a reasonable doubt and the privilege against self-incrimination [would be required]. 221 U.S. 418, 444-49." Note, "The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions", 91 Harv.L.Rev. 1033, 1051 (1978). The noted stated, "Deterrence of discovery abuses, however frequently can be more effectively achieved if the court employs punitive sanctions other than dismissal or default. Id. at 1054.

492 (1982), the court stated that Rule 37(b)(2) requires that "any sanction must be just." The implication is that lower courts must apply sanctions in proportion to the discovery infraction and consider the conduct of the opposing party, particularly where the opposing party has not complied with discovery.

The court below relies on Aztec Steel Co. v. Florida Steel Corp., 691 F.2d 480 (11th Cir. 1982), cert denied 460 U.S. 1040 (1983). App. at 92-93. There the Plaintiff was said not to have served adequate answers to interrogatories three times. But compare, here Defendant TCH concealed the fact that it was given possession of the decedent's heart when it stated under oath in an interrogatory that it had given Plaintiffs access to all the information pertinent to decedent's

hospital records. Or consider that TCH and Dr. Chokhawala failed to produce copies or explain the destroyed clinical summary prepared by Dr. Chokhawala which is required by Florida law. Section 395. 302 Fla. Stat. Under that theory, defendants in this case would have defaulted the case, but for the failure of the district court to act to require the defendants to respond to these issues.

Despite numerous discovery violations including findings that the attorney had made false statements to the court, the court in Chambers v. NASCO, Inc., 111 S.Ct. 2123 (1990), found that outright dismissal of lawsuit is too severe sanction and that less severe sanction of assessment of attorney fees is also within the court's exercise of its inherent powers to supervise litigation.

A. WHEN DISCOVERY INFRACTIONS CAN BE ASSIGNED TO BOTH SIDES, PUNITIVE SANCTION OF DISMISSAL VIOLATES DUE PROCESS OF LAW.

The **Eight Circuit** reversed a district court order which imposed sanctions for failure to make discovery because it found both parties had failed to proceed with discovery. Equal Employment Opportunity Commission v. Carter Carburetor, 577 F.2d 43, 48 (8th Cir. 1978), cert. denied, 99 S.Ct. 865 (1979). That court stated:

> "Since its inception this litigation has been plagued by discovery problems caused, to some extent, by antagonistic and on cooperating counsel from both the company and the EEOC." Id. at 44. The defendant had refused to answer interrogatories from EEOC, repeatedly. Id. at 45-47. The Panel stated: "Because of the way in which both parties have proceeded, or failed to proceed with

> discovery, and the manner in which the sanctions order was entered, we find that the district court exceeded its judicial power in limiting the evidence which the EEOC can present in this case . . . It can readily be seen, in reviewing the record, that both the EEOC and Carter Carburetor have displayed dilatory tactics during the discovery period." Id. at 48.

This decision by the Eleventh Circuit is in direct conflict with the decision in the Eight Circuit. While the Eleventh Circuit has held that the highest opportunity to be heard must be afforded when a sanction is punitive, Donaldson v. Clark, 786 F.2d 1570 (11th Cir. 1986), rev'd., 819 F.2d 1551 (11th Cir. 1987)(en banc), it has applied a rigid deterrence standard. It ignored the fact that TCH certified under oath in answering Petitioners interrogatories, that it had disclosed all information regarding the decedent when in fact it had not. TCH

never disclosed that it was given possession of the decedent's heart and aorta. The heart and aorta is equal in importance to the chest x-rays. Yet Petitioners have never had access to the organs for evaluation by their medical experts. Other records have been destroyed but no defendant was ordered to produce or admit that the items have been destroyed, thyroid scan, clinical summary by Dr. Chokhawala are illustrative. Fla. Stat. § 395.3015, App. at 155.

But compare the district court's determination that Connie Reshard was responsible for the chest x-rays of decedent in the possession of James Reshard, a nonparty had obtained in July 1984. Connie Reshard had copies of those x-rays in September 1984 and when defendant George Bonk requested the chest

x-rays, she produced the copies in response to his production request in July 1986. The district court was required to follow the same procedures against the defendants under the 'rule of the case.' Christainson v. Colt Industries Operating Corp., 486 U.S. 800, 108 s.Ct. 2166, 2177, 100 L.Ed.2d 811 (1988).

B. UNDER PRINCIPLES ENUNCIATED IN THE NINTH CIRCUIT, LACK OF IMPOSITION OF PRIOR SANCTIONS AND WARNING THAT DISMISSAL WOULD BE THE SANCTION, ORDER OF DISMISSAL WOULD NOT HAVE BEEN GRANTED.

The Ninth Circuit has developed a procedure for processing sanctions which arise in the area of discovery infractions that is consistent with due process of law. The action by the Eleventh Circuit directly conflicts with these procedures.

The Ninth Circuit requires consideration of the following:

(1) public interest in expeditious resolution of litigation;
(2) the court's need to manage its docket;
(3) the risk of prejudice to the other party;
(4) the public policy favoring the disposition of cases on the merits; and,
(5) the availability of less drastic sanctions.

Adriana International Corp. v. Thoeren, 913 F.2d 1406, 1413 (9th Cir. 1990)(corporation repeated failure to appear at scheduled depositions compounded by noncompliance with court orders to produce documents warranted default judgment; defendant failed to appear at 6 separate depositions).

The availability of less drastic sanctions was explained in Malone v. United States, 833 F.2d 128, 130 (9th Cir. 1987), cert. denied sub nom Malone v. Frank, 458 U.S. 819, 109 S.Ct. 59, 102 L.Ed.2d 37 (1988). It stated the following:

- did the court explicitly discuss

the feasibility of less drastic sanctions and explain why alternative sanctions would be inappropriate;

- did the court implement alternative sanctions before ordering dismissal, and

- did the court warn the party of the possibility of dismissal? Id at 132; In re Rubin, 769 F.2d 611, 618, n. 7 (9th Cir. 1985).

In applying those principles to this case, it was an abuse of discretion to dismiss the case.[14] There has been no prejudice to defendants under these facts. "A defendant suffers prejudice if the plaintiff's action impair the defendant's ability to go to trial or threaten to interfere with the Rightful decision of the case . . . Delay alone has been held to be insufficient prejudice citation omitted, failure to produce documents as ordered is considered sufficient

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[14] Chambers v. NASCO Inc., ___U.S. _,111 S.Ct. 2123 (1991)

prejudice. citation omitted " 913 F.2d at 1412. Plaintiffs produced all documents requested. Instead the district court deferred making any factual determinations involving discovery infractions involving the Defendants. Defendants were not even ordered to disclose their medical experts while imposing the same requirements on Plaintiffs. Petitioners complied with all requests. This supports the disposition of the case on the merits, particularly when petitioners had alternate sources of proof other than the experts and the presence of destruction and concealment of evidence.

The availability of less drastic sanctions has not been satisfied by the district court in the case in issue. The district court never applied any sanctions prior to dismissal, and it did not warn

petitioners that the sanction would be dismissal of the lawsuit. Instead, the district court referred to the discovery plan's recitation of cost and attorney fees. (R4-187)

In this regard, Connie Reshard did not violate the district court's order to appear at the deposition of Dr. Taylor and Dr. Peniston. First, defendants counsel did not first seek permission to depose the medical witnesses. App. at 239. Second, she did not comply with the cost and fee requirements of Rule 26(b). App. at 120-121. Jeannette Andrews failed to sign the notice of taking of the deposition which would have the effect of implementing the court ordered depositions. The court's order was not self-executing. Rule 26(g) requires that a party does not have to respond when the

paper is not signed under Rule 26(g) and Rule 11. App. at 109-110. This means that the Motion to Strike of July 16, 1990, was not necessary once the date of the depositions had occurred, and Andrews Notice of deposition was moot.

Here the plain meaning of Rule 26(g) and Rule 11 is to be applied. This court stated the Federal Rules of Civil Procedure are to be given their plain meaning. Walker v. ARMCO Steel Corp., 446 U.S. 740, 750 n. 9, 100 S.Ct. 1978, 1985 n. 9, 64 L.ed.2 659 (1980). Judicial inquiry is complete when the terms are unambiguous. Rubin v. United States, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981).

Moreover the substantive importance of the signing requirements under Rule 11 and Rule 26(g), means that the signature

requirement is not just a ministerial act under landmark decisions of this court. Cooter & Gell v. Hartmarx, 496 U.S. ___, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990); Pavelic & Leflore v. Marvel Entertainment Group, 493 U.S. 120, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989)(paper not signed violates Rule 11 and violation can be assigned only to the person signing the paper).

Further, evaluation of Rule 11 violations is not a prospective review but retrospective. The attorney must comply with the law at the time the pleading or paper is signed or filed without the signature. See Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987).

Other lower courts have enforced or recognized the failure to sign a discovery paper as a substantive violation of Rule

11 and Rule 26(g). Standard Guaranty Ins. v. Fidelity & Deposit, 140 F.R.D. 5 (M.D.Fla. 1991), rev'd in part, vacated in part, unpub. mem., No. 92-2034 (11th Cir. 12/11/92); U.S. For Use of Wiltec Guam v. Kahaluu Constr. and Industrial Indemnity Co., 857 F.2d 600, (9th Cir. 1988)(court cited nonsigning of a discovery paper as a discovery violation).

C. RESTRICTION OF MATERIAL EVIDENCE IS PREJUDICIAL AND VIOLATES DUE PROCESS OF LAW.

The District Court has the power to decide issues of law and fact under Rule 11, Rule 37, Rule 16, Rule 41 and its inherent powers. Chambers v. NASCO, Inc, 111 S.Ct. 2123, 2132 (1991); Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

Therefore, the failure of the district court to make factual findings of the following issues against the defendant-appellees is prejudicial error.[15] (R10-376-17). See Lytle v. Household Mfg., Inc., 494 U.S. 545, 555, 110 S.Ct. 1331, 1338, 108 L.Ed.2d 504 (1990).

Further, evidence of violations of

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[15] (i) the destroyed clinical resume on the diagnosis and prognosis of decedent by defendant-appellee Dr. Chokhawala in August 1983; (ii) the issue of the destroyed thyroid scan clearly in the possession and control of TCH and the physician involved, presumably Dr. Bonk, the resident nuclear medicine expert at TCH; (iii) the discrepancy in the location of the decedent's aneurysm in actuality confined to a tiny area immediately above the heart in the ascending aorta, and the false autopsy report that the aneurysm was so evasive it extended all the way down to the renal arteries, the seriousness of both are accentuated by the possession of her heart and aorta, the primary evidence, by defendant-appellee TCH. Thus, other false information could well be contained in the document, which is prejudicial to Plaintiffs.

Rule 11, Fed. R. Civ. P. by defendant counsel Jeannette Andrews and other counsel were side-stepped. When Ms. Andrews applied for a pretrial conference to force Connie Reshard to discuss the taking of depositions of expert witness without applying for a court order under Rule 26(b)(4), Fed. R. Civ. P. and the subsequent series of events, she violated Rule 11, Fed. R. Civ. P. Plaintiffs-Appellants Motion for Sanctions under Rule 11 was required to be granted. The Supreme Court has made it clear that Rule 11 is mandatory and that no finding of bad faith is necessary. See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. ___, ____, 111 S.Ct. 922, 932, 112 L.Ed.2d 1140 (1991); Cooter and Gell v. Hartmarx Corp., 496 U. S. ___, ____, 110 S.Ct. 2447, 110 L.Ed.2d

359 (1990). The alleged finding that Connie Reshard waived her rights is erroneous in fact and law. Any statements said to be in support of that contention which are contained in the transcript of the June 29, 1990 proceeding before Magistrate Sherrill demonstrate the material alteration of a transcript by Paul Rayborn.[16] Thus, defendants were not entitled to obtain the depositions in violation of Rule 26(b)(4), which gave Plaintiffs the right to object and not attend the depositions of Dr. Taylor and Dr. Peniston.

Additionally, the District Court erred when it did not consider evidence in support of Dr. Robert Taylor's

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[16] A court reporter's transcription under 28 U.S.C. § 753(b) is prima facie correct, but there is a rebuttal presumption. United States v. Smith, 453 F.2d 149 (5th Cir. 1970).

participation in this case as an expert. Thus, the factual findings on these issues with regard to Connie Reshard's testimony was clearly in error. App. at 89-90. Anderson v. City of Bessemer City, N.C., 470 U.S. 578, 105 S.Ct. 1504 (1985).[17] It did not consider the letter of transmittal which indicated that Dr. Taylor wrote a substantial set of opinions in the case on July 3, 1986.[18] This letter directly contradicts his sworn

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[17] Connie Reshard has not reviewed her deposition since it was not signed in compliance with Rule 32(b) and (e), Fed.R.Civ.P. App. at 131.

[18] "Find enclosed a consultation on Minnie Reshard as you requested. As you will note, I have outline the major features of the case as I saw them. I have commented specifically on the interaction of the various and sundry drugs that were used in Mrs. Reshard's care as well as on the issue of the dissecting aorta aneurysm. As additional information becomes available in regard to Trazodone, I will forward it to your attention. Dr. Robert Taylor.

statement of July 17, 1990. Equally as important, that court declined the availability of in-cameral inspection of Appellants' work-product in open court on December 6, 1990. Provisions of well settled principles applicable to Rule 11, Fed R. Civ. P., are instructive. "The Rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified." 2A Moore's Federal Practice, paragraph 11.01[4].

The impact of the depositions with respect to Dr. Taylor is diminished by the fact that his testimony in most respects was unnecessary.[19] Together with medical

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[19] Atkins v. Humes, 110 So.2d 663, 665-666 (Fla. 1959). The Florida Supreme Court stated: No medical expert

literature regarding the contraindicated administration of prolixin, pamelor, and desyrel, TCH's failure to move the decedent to TMRMC, and the facts of this case, including the gross negligence of the defendants in ignoring the decedent's clinical history of hypertension and clinical condition of severe chest pain presented, in favor of the treatment of undocumented mental claims, the Atkins principles are applicable here.

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required "where want of skill or lack of care on the part of the physician or surgeon is so obvious . . . within the understanding of laymen and to necessitate only common knowledge and experience to judge it . . . Even in those cases in which some expert testimony may be required to show causation, the jurors may be authorized to infer from the circumstances that the defendant was negligent in the administration of . . . medical treatment, despite the absence of direct expert testimony to this effect and in the face of expert testimony to the contrary."

Under the facts, outright dismissal of the lawsuit is too severe a sanction if any sanction was required at all. Chambers v. NASCO, Inc., 111 S.Ct. 2123; Flaska v. Little Marine Constr. Co., 389 F.2d 885 (5th Cir. 1968), cert. denied, 392 U.S. 928, 88 S.Ct. 2287, 20 L.Ed.2d 1387 (1968). All evidence relevant to the equity in the decision to dismiss a case must be considered. Instead, Appellees have benefited from their conduct without any admonishment or sanction for their wrongful conduct.

II. THE ORDER OF DISMISSAL IS NOT A FINAL ORDER WITHIN THE MEANING OF SECTION 1291 BECAUSE A MOTION FOR RECONSIDERATION TO THE MAGISTRATE JUDGE IS A RULE 59 (e) MOTION, WHICH HAD THE EFFECT OF STAYING THE APPEALS PROCESS TO THE DISTRICT JUDGE AND THE COURT OF APPEALS.

The order of dismissal was not a final order within the meaning of 28

U.S.C. § 1291. Once Petitioners (Plaintiffs) filed a timely Motion for Reconsideration on the merits of the December 14, 1990 Order, Report and Recommendation with the magistrate judge, the district judge could not act to dismiss the case prior to action by the magistrate judge on that motion. United States v. Reddick, 620 F.2d 606, 607 (7th Cir. 1980). The Seventh Circuit held that not only does 28 U.S.C.§ 636 (b)(1)(A)[20] require a party to seek intermediate review in a district court, but that a motion to reconsider a proceeding which reaches the merits of the litigation is a Rule 59(e) motion to amend which tolls the appeals process to the district judge. Id; See also Browder v.

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[20] Rule 72, Fed.R.Civ.P. codifies the provisions of 28 U.S.C. § 636(b)(1)(A), (B), and (C). App. at .

Director Ill. Dept. of Corrections, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978) (application of general rule between district court and court of appeals). The issues discussed in Section I, supra, support the Motion for Reconsideration, to correct errors of law, fact, and to present excluded evidence. See Keene Corp. v. Int'l. Fidelity Ins. Co., 561 F.Supp 656, 665 (D.C. Ill. 1982), aff'd.,unrep. 735 F.2d 1367 (7th Cir.? 1984), aff'd., 736 F.2d 388 (7th Cir. 1984).

Hence, the appeals process to the district judge was not commenced because of the motion to reconsider, then the judgment to dismiss this case with prejudice is not a final order or judgment. Accordingly, the court of appeals should have dismissed the case

under 28 U.S.C. § 1291 and Rule 4 of the Federal Rules of Appellate Procedure.

The Seventh Circuit position in United States v. Reddick, is in conflict with the Eleventh Circuit disposition of this case. Here, Petitioners filed a timely Motion to Reconsider to the magistrate judge. App. at 14. The magistrate judge never ruled on the Motion. However, in an earlier hearing, the magistrate judge acknowledged that a Motion to rehear would be entertained after a ruling was made denying the Motion to Disqualify Defense Counsel and Default Judgment.[21]

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[21] "**MAGISTRATE SHERRILL:** WHEN YOU FILE YOUR MOTION FOR REHEARING, YOU MUST GIVE A GOOD CAUSE FOR NOT PRESENTING ANY EVIDENCE THAT YOU PRESENTED TODAY. AND PLEASE DIRECT YOURSELF TO THAT WHEN YOU ASK FOR A REHEARING OF THE HEARING WE HAD TODAY." (Transcript of Motion to Disqualify Defense Counsel, April 12, 1990).

Here, The district judge treated the Motion to Reconsider as an objection by Petitioners, stating that such a motion for reconsideration was not contemplated by the Federal Rules of Civil Procedure. App. at 8. Clearly this position is not consistent judicial procedure. Petitioners filed objections. (R10-392 at 1-3). Technically, if the district judge can remove a motion to reconsider which is pending before a magistrate judge, when would the magistrate judge know that his jurisdiction over that matter has ended. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982); United States v. Gargano, 826 F.2d 610 (7th Cir. 1987).[22]

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[22] The magistrate judge ruled on nondispositive issues under Rule 72(A), Fed.R.Civ.P. and § 636(b)(1)(A). For example, defendant-respondent Moore's attorney, Jeannette Andrews failed to sign

This analysis is consistent with this court's holding in Buchanan v. Stanships Inc., 488 U.S. ____, 108 S.Ct. 1130, 99 L.Ed.ed 289 (1988)(collateral matter of attorney fees not a Rule 59(e) motion which tolls appeals process). Under the holding in United States v. Reddick, no final order was issued in the district court. This is grounds for reversible error.

This case has been wrongly decided and a writ of certiorari should be issued to correct this manifest injustice and to provide uniformity of decision in Federal courts.

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her notice of taking of depositions under Rule 11 and Rule 26(g). The court ordered depositions were not self executing. In accordance with Rules 11 and 26, petitioners believed that attendance was not required

92-1549

Supreme Court, U.S.
FILED
MAR 23 1993
OFFICE OF THE CLERK

NO. 92 -

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

CONNIE RESHARD and LEROY RESHARD,

PETITIONERS,

VERSUS

DR. EARL BRITT, DR. GEORGE BONK,
DR. DAVID MOORE, DR. PANKAJ CHOKHAWALA,
TALLAHASSEE MEDICAL CENTER, INC.
d.b.a., TALLAHASSEE COMMUNITY HOSPITAL,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

A P P E N D I X

CONNIE RESHARD, ESQUIRE
1825 CONNECTICUT AVENUE, N.W.,
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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-3542
NON-ARGUMENT CALENDAR

District Court DOCKET NO. TCA 85-7216

CONNIE C. RESHARD; and LEROY RESHARD, CO-Personal Representatives of the Estate of Minnie Lee Reshard on behalf of the Estate and certain survivors,

Plaintiffs-Appellants,

versus

DR. EARL BRITT; DR. GEORGE BONK; DR. PANKAJ P. CHOKHAWALA; DR. DAVID MOORE; TALLAHASSEE MEDICAL CENTER, INC., d/b/a/ Tallahassee Community Hospital,

Defendants-Appellees,

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC.

Defendant.

Appeal from the United States District Court
for the Northern District of Florida

(September 30, 1992)

Before TJOFLAT, Chief Judge, KRAVITCH, and HATCHETT, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was taken under submission by the Court upon the record and briefs file[d], pursuant to Eleventh Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHERED ORDERED THAT plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: September 30, 1992

For the Court: Miguel J. Cortez, Clerk

By: /s/

[Karleen McNabl]

ISSUED AS MANDATE: February 26, 1993

ATTACHED WAS A BILL OF COST FOR APPELLEE TALLAHASSEE COMMUNITY HOSPITAL IN THE AMOUNT OF $56.62.

[NOTE: Although the judgment set forth above was marked filed on September 30, 1992, this is not the text of the statement issued on September 30, 1992. The above text was first issued on February 26, 1993 and received by Petitioners for the first time on or about March 8, 1993. I do not know whether the Panel in doing so, that the Panel is

vacating the original order filed on September 30, 1992. It reads as follows:

PER CURIAM:

The issues appellant raises in this appeal are meritless. The district court committed no error, much less an abuse of its discretion, in (1) refusing to disqualify defense counsel; (2) refusing to grant the Plaintiffs default against the defendants; and (3) in dismissing plaintiffs' wrongful death actions with prejudice. Every finding of fact complained of is well supported by the record, and the court properly applied the law to each such finding.

AFFIRMED. {FILED ON SEPTEMBER 30, 1992}

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-3542

REHEARING BY PANEL DENIED AND NO VOTE ON SUGGESTION OF EN BANC REVIEW

DATED: DECEMBER 23, 1992

[TEXT OF PRINTED FORM OMITTED]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-3542

CONNIE C. RESHARD AND LEROY RESHARD, Co-Personal Representatives of the Estate of Minnie Lee Reshard on behalf of the Estate and certain Survivors,

Plaintiffs-Appellants,

versus

DR. EARL BRITT, DR. GEORGE BONK, DR. PANKAJ P. CHOKHAWALA, DR. DAVID MOORE AND TALLAHASSEE MEDICAL CENTER, INC., D/B/A/ TALLAHASSEE COMMUNITY HOSPITAL,

Defendants-Appellees,

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC.,

Defendant.

On Appeal from the United States District Court

for the Northern District of Florida

BEFORE: TJOFLAT, Chief Judge, KRAVITCH, and HATCHETT, Circuit Judges.

BY THE COURT:

Appellant's motion for review by the court of the April 14, 1992 and May 22, 1992 denial of her motion to settle the

record and the inclusion of original audio tapes of transcripts in the record is denied.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-3542

CONNIE RESHARD AND LEROY RESHARD,

APPELLANTS,

V.

DR. EARL BRITT, ET AL.,

APPELLEES.

ORDER: FILED FEBRUARY 26, 1993

(XXX) THE MOTION OF APPELLANTS FOR STAY

( ) RECALL AND STAY ISSUANCE OF THE MANDATE PENDING PETITION FOR WRIT OF CERTIORARI IS DENIED.

[REMAINING FORM OMITTED]

/S/ GERALD BARD TJOFLAT,

CHIEF UNITED STATES CIRCUIT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

CONNIE RESHARD and LEROY RESHARD,

Plaintiffs, TCA 85-7216-WS

V. ORDER

DR. EARL BRITT, et al.,

Defendants.

_____/

In my order of April, 1991, all parties were advised that this court would construe plaintiffs' motion for reconsideration (document 378) as follows:

a) as plaintiffs' appeal of the magistrate judge's rulings on non-dispositive matters; and

b) as plaintiffs' objections to the magistrate judge's recommendations on case-dispositive motions.

In response, plaintiffs filed a few "comments" (document 392) in which they take issue with the way in which the court intends to treat their motion for reconsideration. In addition, plaintiffs filed their objections (document 394) to the magistrate's order, report and recommendation. Despite Plaintiffs' protestations to the contrary, the undersigned will not send any portion of the order, report and recommendation (document 376) back to the magistrate judge; their motion for reconsideration

will be handled as set forth above.

The plaintiffs initially contend the magistrate judge erred in denying their motion to vacate findings of fact (document 344), their motion to strike the deposition of Plaintiff Connie Reshard (document 332) and their motion to strike defendants' notice of taking of depositions duces tecum (document 254) which were scheduled to take place July 17 - 18, 1990 in Washington, D.C. As the court has explained several prior occasions, a magistrate judge's order determining non-dispositive matters must only be set aside upon review if it is found to be clearly erroneous or contrary to law. See 28 U.S.C. § 636(b)(1)(A); N.D. Fla. General R. 27(A). After reviewing plaintiffs appeal, the defendants' responses thereto (documents

380, 391, 393 and 395) and the magistrate judge's rulings on the motions at issue, the court finds that the order in question contained no portions which were in error or contrary to law.

The plaintiffs have also objected to the part of the document 376 which comprises its report and recommendations. All parties were furnished copies of the report and recommendation and were afforded an opportunity to file objections pursuant to Title 28, United States Code, section 636(b)(1). Several of the defendants have notified the court that they do not object to the recommendations contained therein. See documents 380, 391, 393 and 395. Having reviewed the report and recommendation and the parties' objections and responses thereto, the court has determined that the

recommendations should be adopted.

Accordingly, it is ORDERED:

1. The magistrate judge's rulings on plaintiffs' motion to vacate findings of fact (document 344), motion to strike the deposition of Plaintiff Connie Reshard (document 332) and their motion to strike defendants' notice of taking depositions duces tecum (document 254) are AFFIRMED and plaintiffs' appeal of these matters is DISMISSED.

2. The magistrate's judge's report and recommendation (document 376) is adopted and incorporated by reference in this order of the court.

3. Defendants' motions for sanctions (documents 273, 279, 280, 290 and 297) are GRANTED and the following sanctions shall be imposed pursuant to Rule 37(b)(2)(c), Rule 41(b) and Rule

16(f) of the Federal Rules of Civil Procedure:

a) The complaint in this case is DISMISSED with prejudice, although the court will retain jurisdiction to award expenses and attorneys' fees as an additional sanction.

b) Plaintiffs' and their counsel shall pay to defendants their expenses, including attorneys' fees, for all work and expenses related to their attempts to take the depositions of Drs. Peniston and Taylor from June 18, 1990, to date, including without limitation attendance at the June 20, 1990, scheduling conference, responses to all motions filed by plaintiffs that relate to this issue, responses to all appeals of the magistrate judge's orders from June 20, 1990, to date, attempts to communicate with

plaintiffs as to this question, and the filing and litigation of the motions for sanctions and the responses to motions denied in the magistrate judge's order.

4. The court REMANDS this case to the magistrate judge for entry of an order as to the amount of expenses and attorneys' fees which should be awarded.

DONE AND ORDERED this 6th day of May, 1991.

WILLIAM STAFFORD,

CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONNIE RESHARD and LEROY RESHARD,

Plaintiffs,

v. TCA 85-7216-

WS

ORDER

DR. EARL BRITT, et al.,

Defendants.

This cause is before the court upon the magistrate judge's order, report and recommendation (document 376). Parties customarily have 10 days from the date they are served with a report and recommendation in which to file written objections thereto with the district court. See 28 U.S.C. § 636 and N.D. Fla. General R. 27(B). However, in this case, the magistrate judge gave the parties 40 days in which to file objections to his findings. The magistrate judge also clearly explained that the failure to object to the report and recommendation prior to the district court's ruling thereon limits the scope of appellate

review of actual findings.

A review of the file indicates that no such objections have been filed to date by any party. The court notes that plaintiffs have filed a motion for reconsideration of the magistrate's order, report and recommendation (document 378) to which Defendant Tallahassee Community Hospital has responded in opposition (document 380). Neither the Federal Rules of Civil Procedure, nor the Local Rules of this district provide for the filing of such a motion. Furthermore, the order, report and recommendation did not indicate that such a motion would be considered.

Accordingly, unless advised to the contrary within 15 days of the date of the docketing of this order, the court will construe the plaintiffs' motion to reconsider as both an appeal of the

magistrate judge's findings which constitute his order on several non-dispositive matters, and as plaintiffs' objections to the remaining portions of document 376 which contain his recommendations on case-dispositive motions. Furthermore, unless advised to the contrary within the same 15 days, the court will deem that all other parties have no objections or responses to any portion of the magistrate judge's order, report and recommendation.

DONE AND ORDERED this 10th day of April, 1991.

/s/
WILLIAM STAFFORD
CHIEF JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONNIE C. RESHARD, et al.,

Plaintiff,

vs. TCA 85-7216-ws

EARL BRITT, et al.,

Defendants.

_____/

ORDER, REPORT AND RECOMMENDATION

All pretrial matters have been referred to the magistrate by order dated October 17, 1989. Doc. 171. A hearing, as rescheduled, was held on December 6, 1990. The hearing was scheduled for all pending motions, but oral argument was taken only as to the following motions:

1. Plaintiffs' motion to vacate finding of fact. Doc. 344.

2. Plaintiffs' motion to strike Defendants' notice of taking of depositions duces tecum, which were scheduled for July 17 and 18, 1990, in Washington, D.C. Doc. 254.

3. Plaintiffs' motion to strike

deposition of Connie Reshard. Doc. 322.

4. Defendants' motions for sanctions arising from the Plaintiffs' failure to attend the depositions, as well as other matters. Docs. 273, 279, 280, 290, and 297.

In view of the court's rulings and recommendations on these motions, no argument was had upon pending motions concerning discovery and the motions for summary judgment.

I. Procedural status of this case [section omitted][contained a list of motions by the parties which considered only to the extent mentioned immediately above]

II. Plaintiffs' motion to vacate findings of fact, doc. 344

This is a motion filed pursuant to Fed.R.Civ.P. 60(b) to vacate purported

findings of fact in this court's order of June 14, 1990, doc. 220, which denied in part and granted in part Plaintiffs' motion to compel discovery, doc. 134. The reason that this order is denied is simple: the order of June 14, 1990, did not make binding findings of fact.

However, since the underlying assertions made by Plaintiffs are serious allegations of fact and have been made over and over again in this case, a more complete order is entered.

The initial complaint filed in this case contains the allegation that the Defendants destroyed medical evidence, a third x-ray of decedent's thyroid gland. The issue has often been asserted by Plaintiffs in various contexts. It has most recently been raised by document 344, "Plaintiffs' motion for vacation of

finding of fact regarding Chokhawala Clinical resume and TCH's destroyed thyroid scan." Since this issue has been raised so often by Plaintiffs, beginning with allegations in the initial complaint, has been presented by Plaintiffs in such a confused way, and since Plaintiffs have on several occasions accused opposing counsel of misconduct as to this issue, this order, report and recommendation will first determine this motion.

On August 29, 1986, Plaintiffs moved to compel discovery and for sanctions.[1] Doc. 134. The first matter was a request for production directed to Defendant

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[1] In September 1986, the court ordered Plaintiffs to obtain counsel and stayed further proceedings, including a ruling on this motion. After the appeal to the Eleventh Circuit, and when this case again entered the active discovery this year, this motion was determined by the court.

Tallahassee Community Hospital (TCH). That request sought the "contents of the third envelope of x-rays." TCH had responded that the envelope was empty because these x-rays were not taken. Plaintiffs's basis for the motion to compel was the following which is quoted in full: "Attached as Exhibit 'B' is the result of thyroid scan which document the existence of the procedure having been performed." (Emphasis added) Doc. 134, 3rd unnumbered page. Exhibit B attached to doc. 134 is a "laboratory report" which shows a thyroid panel (or profile), listing T3, T4, and T7, and what appear to be percentages. This was the only proof Plaintiffs submitted with this motion to compel. Thus, Plaintiffs by this document affirmatively represented to the court that the notations T3, T4, and T7 were a

thyroid scan which Plaintiffs also represented in this motion to be a third set of x-rays.[2]

On May 11, 1990, TCH filed a motion to strike as to doc. 134. Doc. 201. In that motion, TCH pointed out that in doc. 134, Plaintiffs' motion to compel, Plaintiffs themselves stated that a thyroid profile is a thyroid scan, and that exhibit A to doc. 140, is a thyroid profile. Doc. 201, p. 7. Defendant TCH made the logical argument that if Plaintiffs claimed that a thyroid scan was missing and if they equated a thyroid scan with a thyroid panel, then their motion was baseless because they themselves had attached the thyroid panel results to their motion.

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[2] Plaintiffs made the same representation in doc. 140, page 3, and exhibit A attached.

In Plaintiffs' objections to the magistrate's report and recommendation on Plaintiffs' motion to disqualify counsel, doc. 197, Plaintiffs again mentioned this issue in the context of exhibits which had been submitted to the court in that hearing. This time, Plaintiffs made different assertions of fact. Plaintiffs first asserted that the records show that Dr. Britt requested an "x-ray panel of the chest (thyroid panel)" on August 4, 1983, and show that this x-ray was performed on the same day. Plaintiffs then claimed that exhibits A-2 and A-3 "show that the x-ray was ordered, radioactive material injected in the decedent, as indicated by T-3, T-4 and T-7, a contrast material used for taking x-rays of the thyroid." (Emphasis by Plaintiffs) Doc. 197, p. 17. A similar assertion of fact was made on

pages 24-25, including the following: "The injection of radioactive material is injected at the time the x-ray is to be taken so that the picture will be visible." (Emphasis by Plaintiffs.) In short, Plaintiffs by this document claimed as a matter of fact that the notations T-3, T-4, and T-7 represented radioactive material injected into the decedent to make an x-ray visible. This was false, as Defendants proved in their response.

On May 23, 1990, TCH filed a response to Plaintiffs' objections to the magistrate's report and recommendation on Plaintiffs' motion to disqualify counsel. Doc. 210. Again TCH pointed out that T-3 and T-4 refer to two hormones, and that T-7 is the free thyroxin index," which is the multiplication of the values for T-3 and T-4. Attached to the response of TCH

is exhibit B, a page from a medical glossary, and exhibit C, apparently a page from a medical text, both of which fully support TCH in this observation. TCH argued with what now appears to have been complete justification that counsel for Plaintiffs failed to make a proper Rule 11 inquiry before asserting that T-3, T-4, and T-7 were radioactive material injected into the decedent to make an x-ray visible. Id. , p.9.

The court will now turn to what happened with document 134, Plaintiffs' motion to compel. On June 14, 1990, the court denied Plaintiffs' motion to compel, doc. 134, to the extent that it sought what Plaintiffs' have called the missing third x-ray. The court noted that the

only proof[3] that such an x-ray previously existed was attachment B to doc. 134 (which is clearly labeled a thyroid panel or profile). The court found that this exhibit had not been explained in the motion by the Plaintiffs and appeared on its face to be the results of chemical tests rather than a photographic study. Doc. 220, p.3.

This, therefore, brings us to Plaintiffs' pending motion to vacate a finding of fact. Doc. 344. The motion was filed pursuant to Fed.R.Civ.P. 60(b) and seeks to have vacated "findings of fact" in the order entered June 14, 1990, doc. 220, denying Plaintiffs' motion to compel, doc. 134. In this motion,

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[3] The court can only adjudicate questions based upon evidence submitted, and this is all that Plaintiffs submitted with this motion.

Plaintiffs assert that counsel for TCH deliberately misled this court asserting in his response to Plaintiffs' objections regarding the magistrate's report and recommendation on the motion for disqualification of counsel that T-3, T-4, and T-7 constituted a thyroid scan or x-ray.

As discussed above, Plaintiffs' accusation that counsel for TCH deliberately misled this court is false, contrary to the written record in this court, and malicious accusation by Plaintiffs' counsel. Counsel for TCH clearly made no such claim. That Plaintiffs' counsel would accuse him of deliberately attempting to misled this court by this accusation is one of many examples of Plaintiffs' counsel's vindicative abuse of the adjudicative

process, a matter which will be thoroughly discussed ahead. It was this court, not Defendant TCH's counsel, that found that Plaintiffs only evidence of the existence of a thyroid scan or x-ray was the results of a thyroid panel, and because Plaintiffs had failed in their proof of this issue, the motion to compel was denied. Doc. 220, p.3.

At the hearing on December 6, 1990, and now after a painstaking search of the entire record to try to understand what Plaintiffs' proof is as to the thyroid scan question, the court now understands what Plaintiffs must mean. That understanding has occurred not because Plaintiffs have explained their argument. Indeed, as discussed above, Plaintiffs have obscured their legitimate argument with false statements of fact and

malicious accusations against opposing counsel.

The argument is simple, and could have been explained by Plaintiffs in their motion to compel, doc. 134, but was not. The argument follows from exhibits submitted in the hearing on the motion to disqualify counsel. See doc. 183. Exhibit A-4 is a document entitled "physician's orders" for August 4, 1983, and indicates that the third test to be done (after the T-3, T-4, and T-7 test was a "thyroid scan." The parties are in complete agreement that a thyroid scan <u>is</u> a radiological study of the thyroid done by injection of radioactive material into the body and use of an x-ray to create a photographic image.

The parties are also in complete agreement that pursuant to this order an

envelope was created to contain this x-ray.{because the x-ray was performed and then destroyed} Plaintiffs asserted orally at hearing that the date August 4, 1983, was entered on the envelope and then stricken and August 5, 1983, entered. Plaintiffs have never offered this envelope as evidence, however.) Exhibit A-6, at the bottom, indicates that an x-ray was scheduled to be done on August 5, 1983. Exhibit A-8, nursing notes for August 5, 1983, show that the patient went to x-ray via wheel chair at 10:00 A.M. and returned at 11:30 A.M. Finally, on another page of the physician's order there is a nursing note dated August 4, 1983, (not August 5th) with a temperature of 24 degrees signed by M. Pace, R.N. Directly beside that is what appears to be a pre-printed sticker that says: "X-RAY

COMPLETED. MAY EAT.'

Plaintiffs contend from this evidence the envelope contained the third x-ray. Defendants contend the x-ray was never taken because the decedent died before it was taken.

From a review of these exhibits it is now concluded that Plaintiffs have some evidence from which a permissible inference could be drawn that a third x-ray may have been taken.

Plaintiffs have not, however, proved that Defendants in fact have this x-ray and can produce it. {**Note**:Defendants have offered no evidence that the x-ray was not taken we have all been to the hospital or lab, a file of an x-ray is not created for a later date without a written notation.} While a jury could infer that such an x-ray may have been completed, this court

cannot order Defendants to produce that which they say does not exist and that which Plaintiffs have not shown is in their possession now.

Further, there is no need for the court to vacate a "finding of fact" as to this matter, since the order in which this question was discussed was only a discovery order.

Plaintiffs also seek by the motion to vacate a purported finding fact concerning the existence or non-existence of Defendant Chokhawala's typed clinical resume of treatment of the decedent. Plaintiffs claim in this part of the motion that in doc. 220 "the court found that only one document of Dr. Chokhawala's treatment of decedent existed, the handwritten consultation sheet." Doc. 332, third unnumbered page. Plaintiffs

then claim their is a second clinical resume which has not been produced.

Like other matters asserted in this case, Plaintiffs allegations as to what the court "found" in doc. 220, are false. And like all that has been set forth above, after running rabbit trail through the documents, the falsity of the assertion is eventually discovered. The "finding" that the Plaintiffs seek to have vacated was in doc. 220, which was simply a denial of Plaintiffs' motion to compel discovery, doc. 134. The court's order is only as broad in making a "finding" in this regard as the issue and proof presented by Plaintiff in doc. 134. In doc. 134, Plaintiffs in part sought to compel an answer to interrogatory 5 to Dr. Chokhawala. Plaintiffs alleged in their motion that Dr. Chokhawala's response was

to have attached a copy of a consultation report which Plaintiffs then attached to their motion to compel as their exhibit D to doc. 134. Plaintiffs' basis for the motion to compel is quoted in its entirety:

Plaintiffs comments: T h i s document had been previously submitted, but Plaintiffs could not read for clarity. This is a request for a statement which has not been provided. This question remains unanswered.

In short, the Plaintiffs presented no evidence that there was another document. The court made no finding of fact that another document did or did not exist under these circumstances. Doc. 220. That left the issue of the ability of Plaintiffs to read exhibit D, which is handwritten. The granted the motion to

compel, and ordered Defendant Chokhawala to provide Plaintiffs with a typewritten version of that handwritten document, as well as whatever else he might remember. Doc. 220.

Because document 220 does not contain findings of fact as asserted by Plaintiffs, and since that order is not intended to make binding findings of fact, the motion to vacate findings of fact will be denied.

III. Findings of fact as to Defendants' motions for sanctions, doc. 273, 279, 280, and 297

Since these motions seek the sanction of dismissal with prejudice, the motions are case-dispositive. Consequently, these findings of fact and the conclusions of law which follow in section IV constitute a report and recommendation as to these

motions. In the course of the findings of fact, the basis for orders determining Plaintiffs' motion to strike Defendants' notice of taking of depositions duces tecum, doc. 254, and Plaintiffs' motion to strike deposition of Connie Reshard, doc. 322, will be stated.

These findings of fact are based upon documents filed in this case, answers to interrogatories, transcripts of depositions, orders entered by this court, affidavits, and statements made to this court by counsel for the parties in hearings before this court.

The initial complaint in this case was filed on July 29, 1985, alleging claims for damages against the Defendants for health care of Plaintiffs' mother who died on August 6, 1983. Doc. 1. Plaintiffs initially proceeded without

attorneys as pro se litigants. Plaintiffs Connie Reshard and Leroy Reshard are now represented by Plaintiff Connie Reshard, who is an attorney.

In the early discovery stages of this case there were intimations of the problems that would later surface to impede the progress of this case. On June 26, 1986, the court held a discovery conference. At that time, the centerpiece of the evidence in controversy in this case, certain original x-rays taken by Defendants of the decedent, were in the possession of Plaintiffs brother. The court ordered the Plaintiffs to return those x-rays to the Defendant hospital by July 7, 1986. Doc. 89.

Plaintiffs filed a motion to reconsider the order to return the x-rays, asserting that the court could not order

them to return the x-rays because the x-rays were not in their possession and because Plaintiffs generally claimed they had no control of their brother, James Reshard, who is not a party to this suit who had the x-rays. Docs. 96 and 85. Plaintiffs presented no facts from which the court might reasonably have concluded that James Reshard was beyond the persuasion of Plaintiffs. Indeed, Ms. Reshard's affidavit on the subject that she had 'seen and inspected the original x-rays," giving rise t the inference that the x-rays were entirely within her control. Doc. 85 {not true}

In denying this motion for reconsideration, this court patiently noted that Plaintiff Connie Reshard failed

to observe that the court ordered her[4] to return the x-rays. Further, this court noted that Plaintiffs made no showing of a good faith effort to obtain the x-rays from James Reshard, and presented no credible facts to prove that Plaintiffs for some reason could not get the x-rays from their brother. Since these x-rays constituted the central evidence{******} in this case, critical to both sides, Plaintiffs' behavior was plainly unfair and contrary to fair resolution of the issues at stake herein. {Plaintiff C. Reshard had received a copy of the x-rays from J. Reshard. She reproduced at her

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[4] Plaintiff Connie Reshard's failure to listen to this court when ordered to do something necessary to move this case along to a fair and just conclusion, and her willful distortion of the plain words of this court's orders, has, as will be seen, continued unabated throughout the unfortunate history of this case.

expense a copy of the chest x-rays when requested by counsel for Defendant Bonk on July 7, 1986. Surely the x-rays were just as protected in the hands of Plaintiffs and in the hands of TCH} The motion for reconsideration was denied on August 15, 1986. Doc. 11[5]

By notice filed July 24, 1986, doc. 97, Defendants scheduled the two Plaintiffs and other non-party witnesses for deposition on August 7, 1986. On August 6, 1986, and without notifying opposing counsel,[6]{not so notice was sent to Attorney William Smith by Federal

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[5] Even after the court's second order concerning these x-rays, Plaintiffs continued to file objections. Doc. 140 {merely a notation for the record.}

[6] As will be seen, subsequent events now show that the timing of the motion and the failure to notify opposing counsel was intended by Plaintiffs to obstruct discovery.{not so}

Express two days before the scheduled event, since he was consolidating the scheduling process for all defendants counsel. This means that all defendant counsel had advance notice.} Plaintiffs filed a motion to stay the depositions of Plaintiffs (and the others). Doc. 107. The motion had been served by mail on August 4, 1986. Plaintiffs' motion failed to contain a certificate that Plaintiffs conferred with opposing counsel before filing the motion as required by Local Rule 6(B), and no such certificate was thereafter filed. Defendants asserted they were not notified before the motion was filed, doc. 114, p. 3, and it is concluded that this is true, since Plaintiffs failed to file a certificate of compliance with Local Rule 6(b).

Although the court had not granted

such a stay, Plaintiffs failed to appear for the depositions on August 7, 1986, thereby unilaterally quashing the notice of depositions by their own actions.

The seriousness of this obstruction of the depositions must be evaluated in light of the objections raised in the motion for the stay. One objection to the depositions was that the non-party witnesses had not been subpoenaed. This objection was baseless because Plaintiffs lacked standing to assert this issue on behalf of these persons. The other basis for objecting to the depositions related to the Plaintiffs themselves. Plaintiffs contended that their thoughts about the case were protected by the work product privilege.[7] Doc. 107. This objection

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[7] Plaintiff Connie Reshard did not represent herself and Plaintiff Leroy Reshard as an attorney at this stage of

similarly was improperly used to block the depositions. Setting aside for the moment the question of whether the interests protected by the attorney work product rule have any existence when the Plaintiffs are not represented by an attorney, Plaintiffs are not represented by an attorney, Plaintiffs are parties and a number of matters within their personal observation and memory (such as economic loss from the death of their mother as well as matters which they personally witnessed) would have been proper for inquiry upon deposition even if their strategic thoughts about trial were protected by the work product rule. Plaintiffs had no order from this court

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this case. Both were pro se Plaintiffs at this time. Ms. Reshard entered her appearance as counsel for herself and for Leroy Reshard after the appeal to the Eleventh Circuit.

cancelling or staying the depositions, and should have interposed their work product argument to specific questions at the depositions.[8]

In summary, the objections to the depositions were baseless, improperly interposed, and interposed unannounced to the opposing parties. As a consequence, the failure of Plaintiffs thereafter to attend the depositions constituted an unreasonable unilateral obstruction of

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[8] The appeal with respect to the pro se status of Plaintiffs then occurred, and the motion for protective order was not ruled upon until that appeal concluded. It was denied by an order dated April 12, 1990, doc. 184, which noted that the work product objection could not be raised as a blanket obstruction to depositions, but had to be asserted with respect to specific questions asked at the depositions. That order also ruled that Plaintiffs had no standing to object to the lack of subpoenas for non-party deponents. A motion for sanctions, doc. 115, was also denied.

discovery.

On August 15, 1986, this court entered an order regarding discovery. While the time for responding to the motion to stay the depositions had not yet expired, and thus no ruling was entered then as to this motion, the court noted its concern that the Plaintiffs might be "slowing the progress of this litigation,"[9] and ordered that no further extensions would be permitted. Doc. 111.

On September 2, 1986, the court granted Defendant Britt's motion that Plaintiffs be required to obtain counsel and stayed all proceedings until Plaintiffs could obtain counsel. Docs. 144 and 145. Plaintiffs took an

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[9] In addition to the objections to the depositions, in the initial stages of the case, Plaintiffs sought numerous extensions of time to conduct discovery. Docs. 58, 59, 64, 100.

interlocutory appeal from this order, doc. 147. In a divided decision, the Eleventh Circuit initially reversed this court's order. Reshard v. Britt, 819 [F.2d] 1573 (11th Cir. 1987). The case was reheard by the Eleventh Circuit en banc, and when the en banc court divided equally on the issue, this court's ruling was affirmed as a matter of law. Reshard v. Britt, 839 F.2d 1499 (11th Cir 1988). Doc. 160.

Subsequently, it appearing that Plaintiff Connie Reshard had been admitted to the bar of Pennsylvania, Ms. Reshard moved for admission to this court pro hac vice to represent herself and Plaintiff Leroy Reshard, doc. 161, and the court granted her motion. Doc. 165.

All pretrial matters were then referred to the magistrate. Doc. 171

One pretrial matter was a motion to

disqualify counsel for TCH. After an evidentiary hearing on April 12, 1992, a report and recommendation was made to Chief Judge Stafford recommending that the motion be denied. Doc. 186. That report and recommendation was adopted by the court. Doc. 287.

A second group of pretrial matters pending at that time was the pending motions with respect to discovery. On April 12, 1990, an order was entered denying Plaintiffs; motion for a protective order and sanctions with respect to the depositions which had been scheduled but not held in August 1986. The parties were ordered to reschedule these depositions to occur within 30 days, a period which subsequently was extended. Do. 184, p.3; doc. 194.

A scheduling order was then entered,

doc. 185, and as extended, the deadline for discovery was set for August 17, 1990. Doc. 194. That scheduling order had specific provisions concerning scheduling conferences and discovery of expert witness opinions which will be discussed ahead.

As to Plaintiffs' expert witnesses, in June 1986, Defendant Britt had propounded interrogatories to the Plaintiffs, and interrogatory 8 sought information a "each expert witness you have retained or intend to use at the trial of this cause." Interrogatory 8 asked in part for the "area of expertise" and "substance of opinions" of expert witnesses. Doc. 290, exhibit A. Plaintiffs responded to these interrogatories in July 1986. The responses was sworn to by Plaintiff Connie

Reshard. Doc. 191, exhibit B-13. The response identified Drs. Reginald Peniston and Robert Taylor, both of Howard University Hospital, as experts retained by Plaintiffs or who Plaintiff intended to use at trial. Dr. Peniston's expert opinion was attached and signed by Dr. Peniston. Doc. 191, exhibit B-14 and 15. As to the "area of expertise" and "substance of opinions" of Dr. Taylor, Ms. Reshard stated under oath:

> The substance and areas of expected expertise are failure to properly diagnose the dissection and to properly read the chest x-rays, the administration of drugs, established standards of care for the diagnosis and management of patient with dissecting aorta, and the standards of care for a hospital.

Doc. 191, exhibits B-7 and B-13

Over the course of a number of months prior to June 1990, the parties and the court had difficulty reaching Ms. Reshard by telephone on several occasions. Docs.

167, 180, 193. On June 11, 1990, Defendants filed a motion for a scheduling conference. Doc. 218. In that motion, Defendants stated that they had been trying to schedule the depositions of Plaintiffs' two expert witnesses since May 2, 1990, but had been unsuccessful. Defendants stated that they had attempted to communicate with Plaintiffs' counsel by letters and by telephone, but that repeated telephone messages left on Plaintiffs' counsel's telephone recorder had resulted in no returned telephone calls. Finally, Defendants stated that they had requested that Plaintiff's counsel provide them with a day-time telephone number at which she could be reached, but she had refused. Doc. 218.

At this point it should be noted that paragraph (2) of this court's scheduling

order, doc. 185, clearly stated that upon motion, a discovery conference will be scheduled. Paragraph (5)(h) of the same order clearly provided that upon request of any party, a scheduling conference will be held.

On June 14, 1990, the court entered an order which ruled upon all then pending discovery disputes. It was observed in that order that the time for filing a response tot he motion for a scheduling conference had not yet expired. But as set forth above, it was the court's intent to monitor this case closely and to move it along through discovery without further unnecessary disputes. In that order the court wrote in part:

> This court will not tolerate further disparaging personal remarks between counsel.
>
> * * *
>
> Sanctions will not be awarded as a result

of this round of discovery problems because some of the problems seem to have occurred some years in the past. Since this case is now in active discovery and will be closely monitored by the court, it is hoped that sanctions will not be needed to keep this case on track.

Doc. 220, pp. 7-8. As to the motion for scheduling conference, the court advised the parties:

While the time for are [sic] response to this motion has not yet elapsed, the court will ordinarily set a telephone hearing or conference whenever a party in this case demonstrates an apparent need, and will not await a response from the opposing party. A scheduling conference by telephone will be set for 10:00 A.M., June 20, 1990.

Id., p.8.

The scheduling conference was set for June 20, 1990, at the request of the Defendants because the Defendants, represented by numerous counsel, stated in their motion that they were available to conduct the depositions on July 17 and 18, 1990, because it was obviously difficult

for this number of attorneys to find a mutually acceptable date for these depositions, and because the discovery deadline was approaching and there was a need to have a conference to establish firm deposition dates acceptable to all parties.

Because there was the possibility that Plaintiff's counsel could not be present for the scheduling conference on June 20, 1990, and in an effort to reduce needless delay involved in the filing and consideration of a motion to continue, on June 18, 1990, the magistrate instructed the Deputy Clerk immediately to call Plaintiffs' counsel to advise her of the contents of this order. The Deputy Clerk did so, was unable to reach Plaintiffs' counsel but left a message on her telephone answering machine. The

telephone conference was held as scheduled, but Plaintiffs' counsel failed to answer her telephone and was not present for the conference.

Less than one hour after the telephone conference had ended, the court received doc. 223 from Plaintiffs. The letter was mailed on June 18, 1990, and states that counsel for the Plaintiffs had that date received the court's order of June 14, 1990, which scheduled the conference for June 20, 1990, and was responding to the magistrate's telephone call (the call placed on the magistrate's behalf by the Deputy Clerk) regarding the June 14, 1990, order. Plaintiffs' counsel then stated she was "absolutely unavailable" for a telephone hearing on June 20, 1990.

In short, on June 18th Plaintiffs'

counsel knew that a telephone conference was to be held two days late, knew that five other lawyers for Defendants would be present for the conference, knew that the Deputy Clerk of this court had called her to be sure she knew of the conference call, and yet did nothing to call opposing counsel or this court to move for a continuance or tell everyone she would not answer her telephone when the telephone conference operator called.

The letter, doc. 223, was treated as a motion to continue the conference and was denied as untimely filed. Doc. 224. More important, in an effort to stop this behavior on the part of Plaintiffs' counsel, the court found:

> Counsel for the Plaintiffs has missed an important procedural point. When a court sets a hearing or a conference, it has not ruled upon the merits of the matters before it. It simply wishes to set a time to hear the controversy. The reason

that this court asked the Deputy Clerk to call Plaintiffs' counsel was to be sure she was aware that the court had set the scheduling conference on short notice. As an officer of this court, counsel has the responsibility to this court and other counsel to remain in communication so that this case may proceed efficiently, without undue expense to either side. Since counsel for the Plaintiffs knew that the scheduling conference was set for June 20, 1990, it was counsel's responsibility to use the same means of communication the court had used, the telephone, to let either the Clerk or my secretary know that she was not available for the June 20th conference. Had she done so, the time that Defendants' counsel and this court spent preparing for and attending the telephone conference would have been avoided. (Footnote omitted.)

Doc. 224.

As a result of the scheduling conference, the court entered an order to the parties that <u>required</u> that the depositions be held on July 17 and 18, 1990. Although it would have been fair to Defendants for the court then to have ruled that Plaintiffs had, by their behavior, forfeited all right to complain

about the depositions of their experts, it nonetheless left open the opportunity for Plaintiffs to state good cause why these depositions should not take place on those dates. But as warned before in the order quoted above, it was the court's intent to monitor discovery closely. It was intended by this order to leave no doubt in Plaintiffs' counsel's mind as to what was expected. Thus, thus, court ordered the following:

> The depositions of the Plaintiffs' expert witnesses, Drs. Peniston and Taylor, shall be conducted on July 17 and 18, 1990. The place and times for these depositions shall be set by the Defendants through normal procedures, including the use of deposition subpoenas. If the Plaintiffs have good cause that these depositions should not take place on the above dates, such good cause must be presented to this court by a motion filed, it must provide the Defendants with every date on which the Plaintiffs' experts will be available for deposition within the discovery period. (Emphasis added)

Doc. 224.

It was now obvious to the court that one of the problems not only by the Defendants, but now by the court itself, was the inability to contact Plaintiffs' counsel by telephone during the active discovery period. Consequently the following order was also entered:

> By July 2, 1990, Plaintiffs' counsel shall file with the court a telephone number where she can be reached either in person or by a message delivered to her by another person during the hours from 9:00 A.M. to 5:00 P.M. Monday through Friday of each week. It is not the intent of the court that the Plaintiff be required to be required [sic] to respond immediately to the caller, but to get the telephone message promptly during the day and to return the telephone call before 5:00 P.M. that same day, absent good cause for not doing so.

Doc. 224.

The next day, June 21, 1990, Defendants, through counsel for Defendant Moore, filed and served a notice of taking the depositions of Plaintiffs' experts, Drs. Reginald L. Peniston and Robert

Taylor. The original of the notice filed with the court contained the signature of counsel for the Defendant Moore on the certificate of service but not at the place provided at the end of the notice but before the certificate of service. The certificate of service, however, clearly identified the notice of taking depositions to be the one for Drs. Peniston and Taylor. Thus, there was no ambiguity as to what was intended by counsel for Dr. Moore. Doc. 225.

At this point the provisions of this court's scheduling order concerning discovery from expert witnesses is pertinent to the ensuing events. The scheduling order, entered on April 17, 1990, ordered the following with respect to experts:

(3) Expert Witnesses. The identification of expert witness and their opinions is

commonly the source of most pre-trial delay. In order expedite the discovery process, and in addition to the requirements of Rule 26(b)(4)(A), each party shall submit to the opposing party at the earliest opportunity a list of all expert witnesses anticipated to testify at trial. The list shall also include the address and area of expertise of each expert witness. A copy of each expert's written opinion with supporting facts and grounds, or a written summary thereof, shall be attached to the list. Although no time deadline is set herein for submission of this information, the parties are directed to do so sufficiently in advance of the discovery deadline set in paragraph (1) of this order so depositions may be scheduled and taken before the discovery period ends . . . . The parties are reminded that discovery depositions of experts expected to be called as witnesses at trial are subject to the provisions of Rule 26(b)(4)(A)(ii).

Also relevant to the ensuing events is Local Rule 6(B) which provides with respect to motion practice in this district:

(B) **Counsel Conference Required.** Counsel for the moving party shall confer with counsel for the opposing party and shall file with the court at the time of filing a motion, or within three (3) days thereafter, a statement certifying that he has conferred with counsel for the

opposing party in a good faith effort to resolve by agreement the issues raised and the results thereof . . . . (Emphasis added)

The clear intent of Local Rule 6(B) is that counsel for the moving party must in good faith try to resolve issues by conference with counsel, not by filing motions, and that such conferences should occur before the motion is filed, absent some good cause for failing to do so.[10]

On June 27, 1990, Plaintiffs filed a motion to quash the taking of the depositions from Plaintiffs' expert witnesses and a motion for a protective order. Doc. 228. The gist of this motion was that Defendants had not complied with Rule 26(b)(4)(A(ii) because they had not

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[10] Additionally, counsel for the moving party must file a written certificate as to those conferences with the motion or within three days thereafter.

obtained this court's permission to take the depositions before filing the notice.[11]

Plaintiffs' counsel, Ms. Reshard, who resides in Washington, D.C. was in Tallahassee, Florida, for her own deposition on June 27, 1990, the day the motion to quash was filed. Given the problems of scheduling hearings in this case and the need to keep on the discovery schedule, a hearing upon Plaintiffs' motion to quash the expert depositions was

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[11] The prior filing of a motion to take the depositions by Defendants, followed by a court order granting the motion, is the only part of the rule argued in this motion. Plaintiffs did not mention the question of payment of expenses of the deposition and it can only be concluded that the issue of the expert witness fee was of no concern to Plaintiffs when the motion was filed. At the hearing the next day, the court raised this question sua sponte and ordered Defendants to pay the expert fees involved with these depositions.

scheduled for the next day. Before turning to what happened at the hearing on June 29, 1990, however, the court must review what Ms. Reshard testified to under oath about Plaintiffs' expert witnesses at her deposition the day before. But before doing that, Plaintiffs' motion to strike Ms. Reshard's deposition, doc. 322, must be discussed. Plaintiffs' counsel objected to consideration by this court of her deposition because she had not reviewed the transcript to note errors by the court.* This motion was taken up at the hearing on sanctions on December 6, 1990, and was then orally denied. Ms Reshard did not go to the court reporter's office to review the transcript. Counsel for Defendants represent that the court reporter sent a letter to Ms. Reshard advising her that she should come to

review the transcript, but that the letter was returned to the court reporter unclaimed. Defendants thus sent Ms. Reshard a copy of her own deposition for review. By the date of the hearing, December 6, 1990, Ms. Reshard had been in possession of a copy of her deposition for more than 30 days and thus had more than 30 days to review that copy to find errors, if any. She had by that time filed nothing with the court reporter or this court as to alleged errors. Therefore, all of the safeguards provided by Fed.R.Civ.P. 30(e) were satisfied. For this reason, the motion to strike this deposition was and is denied.

In her deposition, Ms. Reshard was asked if Drs. Peniston and Taylor had agreed to testify at trial. She evaded this question for several pages of

transcript. Doc. 301, pp. 110-113. Finally she testified: "I told you that I have their authorization to submit their names to be used at trial." (Emphasis added.) With respect to Dr. Taylor, Ms. Reshard also testified that her answer to Defendants' interrogatories as to the substance of his expert opinion came from Dr. Taylor. Doc. 301, p. 161.

At the hearing on June 29, 1990, the court began by advising the parties that a hearing had been set immediately because it was felt that the discovery problems could be alleviated by having the parties meet together rather than continuing to pull further and further apart in accomplishing discovery.[12] T 7. The court stated that the motion to quash had

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[12] The transcript of that hearing is doc. 227, hereafter T followed by the page number.

been read, that no argument was needed, but that information was needed to reach a just determination of the question of expert witness depositions. The court's intent was to give Plaintiffs a full opportunity to put before the court every objection they might conceivably have to the expert witness depositions so that these objections could be speedily ruled upon so that both sides would not spend needless time and money on this issue.

Questions were then directed to Ms. Reshard by the court. In response to initial questions, Ms. Reshard stated that she intended to call Drs. Reginald Peniston and Robert Taylor as experts at trial, and that she had identified these experts as early as 1986. T 8, lines 8-14, 18-22.

With respect to the question of

requiring Defendants to file a motion to take the depositions of these experts, Ms. Reshard acknowledged that she had sent several letters to counsel for Defendant Moore, Ms. Andrews, concerning these depositions. These letters are attached to Defendants' motion for a scheduling conference to set dates for the deposition of Plaintiffs' expert witnesses. Doc. 218 On May 17, 1990, Ms. Reshard wrote to Ms. Andrews, and the bottom of this letter, Ms. Reshard wrote: "Regarding the experts, please give me some idea of the times you prefer, and I will contact them and let you know.'' T 11-12. Ms. Reshard wrote Ms. Andrew again the next day as to her expert witness depositions stating "I will be happy to take any proposed dates and relay them to the witnesses and we will let you know what dates are okay."

A third letter was sent by Ms. Reshard to Ms. Andrews on June 4, 1990, in which she acknowledged that Defendants had set July 17 and 18, 1990, as dates for these depositions, and asked that she be assured that these dates were scheduled on Defendants' counsels' calendars before she confirmed them with herself and her experts.

In short, from May 17, 1990, through June 4, 1990, Ms. Reshard said nothing of requiring Defendants to file a motion for permission to depose these experts. Instead, she behaved as if the only issue between the parties was when to have the depositions.

The court thus asked Ms. Reshard whether an any time before she filed her motion to quash the depositions she had informed Defendants that she would insist

that they file a motion for the said court's permission to depose her experts. She said no. T 14, lines 15-18. She explained that she was not going to tell them they were not doing it correctly, and that "[w]hen the point in time came and they didn't do it correctly, I was going to advise them that it requires a court order." T 14, lines 20-23. The court asked what she meant by "the appointed time," and Ms. Reshard said: "Well, once the proposed dates were clear and there was nothing forthcoming shortly thereafter within days of a motion, I was going to advise her that she hadn't raised these issues which complied with the rule and to expect that we would object." T 15, lines 7-11.

In short, Ms. Reshard's plan was to require five attorneys for Defendants to

set aside two days on their calendars, schedule the depositions, make travel plans from Tallahassee to Washington, , D.C. and then she would file her motion to quash, demanding a motion from Defendants and an order from this court that the depositions be allowed.

Ms. Reshard was then asked that if her objection to the depositions were satisfied, that is, if Defendants filed a motion, and if the court granted the motion and ordered Defendants to pay the expert witness fees, what other objections would she have to the depositions. Ms. Reshard said she did not then know of any other objections, but made it plain that she would research and attempt to come up with. (This is not precisely what she said, but is the practical effect of her answer.) T 16, lines 24-25, T 17, lines

1-25, T 18, lines 1-18.

Plaintiffs were on notice by the scheduling order that the court would expect the parties to have the opportunity to depose one another's experts. Despite the admonitions of Local Rule 6(B) that the moving party confer in good faith with opposing counsel to resolve issues, Plaintiffs' counsel failed to tell Defendants that she would insist that they strictly follow Rule 26(b)(a)(A)(ii) by filing a motion for permission to depose Plaintiffs experts. Instead, she demanded that five opposing attorneys set aside two days on their calendars, not including travel time, and make their travel plans, and then she intended to file her motion. When the motion was filed, the only grounds that stated for relief was that Defendants had not filed

a motion.

At the June 29, 1990, hearing, the court deferred adjudication of the question whether Plaintiffs' motion to quash was filed in bad faith. Instead the parties were told that the court's interest was simply to insure that both sides had a fair opportunity for discovery. T 19, line 25, T 20, lines 1-25, T 22 lines 20-23, T 50 lines 17-25, T 51 lines 1-3. The court also stated at the June 29, 1990, hearing that it did not want to determine who was at fault at this point, but simply wanted the parties "to start from today going forward working together to try to get fair discovery completed." T 19 lines 24-25, T 20 line 1. The court warned, however, that the next time such problems arose, a hearing would be held and a recommendation would

be made as to who was at fault. The language used was as forceful as the court could make it. T 19 lines 15-24.

The time has now come to adjudicate all of these issues, and the following observations are made. Fist, while the scheduling order quoted above stated that expert witness depositions are subject to the provisions of Rule 26(b)(4)(A)(ii), it is unmistakably implicit in that order that all parties shall ordinarily be allowed the opportunity to depose the experts of their opponents. Indeed, the order states that discovery from experts causes delay in cases, and that to remedy that problem the parties were required to identify experts and exchange written expert opinions well in advance of the discover deadline so that depositions could be taken before discovery closes.

Second, it is exactly this sort of issue which Local Rule 6(b) was intended to resolve by conferences between the parties. The only basis for the motion to quash was that Defendants had not filed a formal motion for permission to do so. By following Local Rule 6(B), the entire matter would have been resolved either between the parties or by the court after such a motion was filed. Third, Plaintiffs' counsel had several opportunities to tell her opposing counsel that she intended to file this motion. Instead, she engaged in communications which attempted to set dates for depositions, thus reasonably leading opposing counsel to believe that there was no other technical barrier to the depositions. By so doing, she caused the Defendants the expenses of such fruitless

negotiations, and caused their attorneys to set aside July 17 and 18, 1990, on their calendars for the depositions, thus precluding the scheduling of other work on those days. Fourth, Defendants had filed a motion for a scheduling conference. The motion asked this court to facilitate the scheduling of the depositions of Plaintiffs' experts. Doc. 218, p. 2. By this motion the Defendants clearly said they wanted to depose Plaintiffs' two experts and wanted an order of depositions and cause the depositions to take place. It was, in effect, a motion to depose Plaintiffs' experts.

For all of these reasons, Plaintiffs' motion to quash the depositions filed June 27, 1990, was filed in bad faith as an intentional effort of Plaintiffs' counsel to obstruct discovery and cause needless

expense to Defendants.

The motion to quash was denied as having been waived by Plaintiffs' behavior, T 22 lines 2-23. It was also denied because Defendants' motion for a scheduling conference was treated as a motion to depose Plaintiffs' two experts and was granted. T 22 lines 24-25, T 23 lines 1-3.

The next issue taken up at the hearing on June 29, 1990, was the scheduling of the depositions. The court had two concerns: whether the experts were actually ready to be deposed so that a deposition would be fruitful, and whether the experts and counsel were available for July 17 and 18, 1990. The court made it clear that the discovery period would be extended to accommodate meaningful depositions, and that

scheduling conflicts with the expert witnesses were to be avoided. T 27 lines 20-23.

As to the first issue, the court asked Ms. Reshard whether her experts had formulated their opinions and whether they were ready to do that now. Ms. Reshard said:

> Yes. They have provided opinions back in 1986, in fact, July 1986, four years ago. (Emphasis added)

T 8 lines 15-19. The court was not satisfied with this answer, and asked: "Are your experts prepared now for deposition by Defendants . . . . Would a deposition be fruitful? Would it be a waste of time?" T 9 lines 20-25. When counsel responded twice that she did not understand, the court tried to asked the same question again. What followed was inconclusive. T 10 lines 1-25. So the

court asked Ms. Reshard again: "Are your experts available for deposition on the 17th and 18th, as requested by the -- the Defendants?" Ms. Reshard finally replied: "Well, Your Honor, I have submitted the information to both experts, and Dr. Peniston's schedule, in all likelihood, will be able to do so. I have not heard from Dr. Taylor. He has not responded to my inquiry." (Emphasis added), T 11 lines 5-10.

Defendants were not satisfied with these answers, and asked the court to inquire again. T 29 lines 9-15, 20-23. The court first asked "[h]ave the experts been retained, and have they agreed to testify in this case?" T 29 lines 24-25. Plaintiffs' counsel replied: Yes, Your Honor. I indicated to them yesterday that I did -- that I -- that's why I got their

statement, that's why I submitted their names; otherwise, there would be no reason to do so." (Emphasis added). T 30 lines 1-4.

The court next asked again if Dr. Peniston had "reviewed everything, and is he ready to answer questions." T 30 lines 8-10. The court intended to ask this same question with regard to Dr. Taylor, but that became unnecessary after Plaintiffs' counsel answered the question using the plural. She first repeated that there were some new documents she wanted Dr. Peniston to review. She then spoke of what she had done in late May 1990 regarding these depositions, stating that she had food poisoning, but "that following week [the first week of June 1990] I contacted them as I had promised. I have no reason to delay. In fact, had

they given dates when they said on May 2nd when we wanted to do it, I would have taken the dates to them then." (Emphasis added), T 30 lines 11-23. The court asked again, was Dr. Peniston ready for deposition, and again the Plaintiffs' counsels answer used the plural to indicate that both experts were ready to be deposed:

> Well, obviously, Your Honor, it would be stupid for me, since it's in my interest, if testimony is going to be taken, that it's done in such a way that it supports my case to the extent that they can provide that information. And therefore, it would be in my interest to make sure, if there is anything else that they need, to provide it. I mean, that's the only reasonable thing to do. I have no reason to delay. And the delay that has gone forth thus far was unnecessary. (Emphasis added)

T 31 lines 2-10. Having heard this response, this court told Ms. Reshard: "Okay. Well, I take that to mean that's clearer yes than I had asked for, and I

appreciate that." T 31 lines 11-13.

Earlier the court had advised Ms. Reshard that the court concluded that Dr. Peniston's "opinions are ready and he says his schedule is ready," T 23 lines 15-17, 21-22, and the court turned to the availability of Dr. Taylor. Plaintiffs' counsel was allowed more than adequate opportunity to advise the court that either or both of her expert witnesses were not yet ready for deposition. Every response given by Plaintiffs' counsel indicated that both experts had been retained by Plaintiffs' counsel, had agreed to testify for Plaintiffs, had formed their opinions, and were ready to be deposed.

The second issue the court had to determine at the June 29, 1990, hearing was whether the two experts were in fact

available on the dates proposed. Dr. Peniston's subpoena was for July 17, 1990, and counsel for Defendants asked whether he was available for deposition on July 18, 1990. The court asked Ms. Reshard if she had said that Dr. Peniston was available on the 18th, and she replied: "That's what I said, Your Honor." T 32, line 23.

Consequently, as to Dr. Peniston the court entered the following orders:

> It is my order that subpoena includes the 18th, and counsel for the Plaintiffs shall make him [Dr. Peniston] available on the 18th for that deposition.
>
> * * *
>
> The deposition of Dr. Peniston is scheduled for the 18th, and that subpoena is continued to that date, and the Plaintiffs' counsel is ordered to make him available on that date. He is expected to be prepared to give testimony as to whatever he is going to testify in this case, based upon every scrap of evidence that Plaintiffs have to date.

T 32 lines 24-25, T 33 lines, 1, 22-25, T

34 lines 1-2.

There remained a question of whether the subpoena had been served upon Dr. Taylor, and it was unknown whether he was available either the 17th or 18th of July. Counsel for Defendants were to express mail a notice to Dr. Taylor to advise him that his deposition was scheduled, and give him notice to call the magistrate's office as to whether he was available on the 17th and 18th. The court then entered the following order as to Dr. Taylor's deposition:

> If he [Dr. Taylor] is available, Plaintiffs' counsel is ordered to be -- to ensure that he is ready to go for deposition and to give his opinions as to every scrap of evidence that the Plaintiffs now have in their possession.

T 34 lines 22-25. The only contingency in the order to Plaintiffs' counsel was the question of Dr. Taylor's own schedule.

After other matters were taken up at

the June 29, 1990, hearing, the court made the following entreaty to the parties:

okay. I would like to end on a hopeful note. I would like everyone all seated here, you are lawyers, and lawyers have an obligation to work together because it's an honorable work that we are doing trying to bring controversies to court and to a jury for ultimate resolution. And I ask everyone to do that. I ask you, Ms. Reshard, because you are a lawyer, to make things work smoothly and to give and take with the other side. And I say that to Defense counsel as well. And I hope you can set aside the differences you've had before and begin today doing that. I hope that you will.

T 50 lines 17-25, T 51 lines 1-3.

The court's entreaties, as well as the court's orders, were ignored by Plaintiffs' counsel. Only July 5, 1990, Ms. Reshard inspected the original of the notice of depositions of expert witnesses, doc. 225. She observed that Ms. Andrews had signed only the certificate of service. Affidavit of Connie Reshard dated July 5, 1990, attached to doc 254.

Fourteen days later (on July 18, 1990) Ms. Reshard filed a motion to strike Defendants' notice of taking depositions. Doc. 254. The motion declared that Defendants' notice of depositions and this court's subpoenas were "NULL AND VOID" BY OPERATION OF LAW," "PLAINTIFFS counsel is not required to comply with the taking of depositions . . . ." Doc. 254, p. 3.

The only basis for this second motion to block the depositions wa that Ms. Andrews signature appeared in only one place on the notice of depositions. This was a notice of depositions that was served and filed on June 21, 1990, eight days before this court held a hearing and painstakingly afforded Plaintiffs every opportunity to raise legitimate objection they might have to the depositions.

The second motion to strike the

notice of deposition had no conventional certificate of service, but recited that was mailed on July 16, 1990. Doc. 254. At the hearing on the motion for sanctions,[13] Ms. Reshard said that her second motion was mailed close to midnight on July 16, 1990. The depositions were to have commenced the next morning.

At the hearing upon the motion for sanctions, Mr. Seymoe, counsel for Defendant Chokhawala, said that he talked with Ms. Reshard by telephone on July 16, 1990. He asserts that he asked Ms. Reshard whether the depositions were still going to take place the next day. Ms. Reshard denied this. Ms. Reshard's denial is not credible. It is more credible, given the history of this case, that Mr.

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[13] The hearing on the motions for sanctions was held on December 6, 1990.

Seymoe did directly ask Ms. Reshard whether or not the depositions were still on for the following morning. Ms. Reshard admitted that she did not tell Mr. Seymoe that she was filing a motion to strike the notices of depositions, admitted that she did not tell Mr. Seymoe that the depositions were cancelled, and admitted that she did not confer with any of the defendants before filing her second motion to strike the notices of depositions.

The second motion to block the depositions was not accompanied by any certificate of counsel for Plaintiffs that she contacted counsel for the Defendants prior to filing the motion, or that they had any notice that she would not attend the depositions before they left Tallahassee, Florida, for Washington, D.C.

Counsel for Defendants thus were not

notified that Plaintiffs' counsel would not attend the depositions, and flew to Washington, D.C. A short deposition was taken from Dr. Taylor, about which more will be said, and a telephone transcription of a conversation with Dr. Peniston was also obtained. Plaintiffs' counsel failed to show up for the depositions.

In the period following the June 29, 1990, hearing and the date scheduled for the depositions, Plaintiffs had appeals pending before Chief Judge Stafford. On July 2, 1990, Plaintiffs filed an appeal, doc. 233 and 235, from orders entered by the magistrate, docs. 220, 224, and 232. There was no stay of these orders during this period, and Plaintiffs did not ask for a stay. Chief Judge Stafford denied Plaintiffs' appeal before she filed the

second motion to strike the notices of depositions.

In summary, once again Plaintiffs' counsel had unilaterally blocked discovery, and again the basis for doing so was completely spurious. The court had ordered that these depositions occur by the first order entered June 20, 1990. The court denied Plaintiffs' first motion challenging the notices of depositions after an extensive hearing on June 29, 1990, at which time Plaintiffs' counsel was given a full opportunity to present any legitimate objection that might exist to the conduct of these depositions on July 17 and 18, 1990. And Plaintiffs' counsel was personally ordered to see that the depositions were to take place.

Plaintiffs' counsel discovered the claimed defect in the notice of deposition

on July 5, 1990, yet she told no one. She waited until midnight of the day before the depositions were to take place before mailing the second motion to strike, unilaterally declaring herself absolved of this court's order to cause these depositions to take place. She did not even tell Defendants' counsel so that they could avoid the expense of traveling to Washington, D.C. By refusing to attend the depositions, Plaintiffs' counsel, and Plaintiffs, contemptuously[14] violated this court's order that she make her experts available for deposition on July 17 and 18, 1990.

The second motion to strike the

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[14] This report and recommendation does not attempt to address contempt in the formal sense, or recommend a penalty for contempt of court, though a basis for such proceedings is probably extant in this record.

notice of depositions was like the first, unreasonable and baseless. This was only a notice of taking depositions, hardly a major pleading in the file. It had been preceded by a long history of attempts by defense counsel to communicate with Ms. Reshard to set these two depositions. It had been preceded by a motion filed on behalf of all Defendants by Ms. Andrews asking that these depositions be scheduled. It had been preceded by this court's order that the depositions be held on July 17 and 18, 1990. Ms. Andrews signed the certificate of service, and that certificate explicitly identified service of a notice of deposition of Drs. Peniston and Taylor. It is impossible for Plaintiffs to have believed that Ms. Andrews did not file this notice of depositions with the intent formally to

schedule them for July 17 and 18, 1990. Plaintiffs' assertion that the pleading was defective by lacking of a signature preceding the certificate of service was a sham.

Moreover, Plaintiffs' citation of Fed.R.Civ.P. 11 as a basis for the motion was an abusive resort to this overworked rule. Rule 11 provides in apart:

If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omissions is called to the attention of the pleader or movant.

(Emphasis added.) Local Rule 6(B) required Plaintiffs' counsel to confer with Ms. Andrews before filing this motion and give her an opportunity, as stated in Rule 11, to sign the notice as demanded by Plaintiffs. Plaintiffs' counsel could not have seriously believed Ms. Andrews would not have done so in view of her prior

attempts to schedule these depositions, her motion for a scheduling conference, and this court's two orders that the depositions be held on these dates.[15]

On July 17, 1990, Dr. Taylor appeared for his deposition and a transcript has been filed of that deposition. Doc. 291. Ms. Reshard did not appear to represent the Plaintiffs. Id., pp. 2-3, 6. Dr. Taylor was placed under oath.

In her response to Defendants' motion

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[15] It is hard to see how the purpose of rule 11 was even involved with a notice of depositions under these circumstances except to show that the person signing it had read it, and that function was completely served by the signature on the certificate of service. A notice of deposition does not allege any facts or argue any points of law, and thus there is no serious occasion for the application of the provision of rule 11 that an attorney's signature on the document constitutes a belief that it is "well grounded in fact and is warranted by existing law."

for sanctions, Plaintiffs' counsel claimed that it "smells illegality and unethical conduct by defense counsel" that Dr. Taylor appeared as his scheduled deposition and testified that he had no expert opinion and was told by Ms. Reshard not to attend the deposition. It would appear that the wind is from the other direction. Dr. Taylor's testimony was under oath. Plaintiffs' charge is accompanied by no supporting evidence. As an argument that this deposition cannot be considered by the court because Plaintiffs' counsel was not present at the deposition it is not very persuasive given the fact that the court had ordered her to be there.

The following are the significant excerpts from Dr. Taylor's testimony:

Q Dr. Taylor, do you anticipate testifying in the trial in the case that

I described earlier"

A Well, I'm not aware of the details of the case, the charges that have been levied. So I'm really not aware of the nature of the case, except by your comments at the beginning of this deposition.

Q The comments that I made on the record?

A Yes.

Q Have you formed an opinion such that you are prepared to express an opinion today that any one of the defendants in this case is guilty of medical malpractice?

A I do not have an opinion.

Q Could you tell me of the contacts that you have had with counsel for the plaintiff, Ms. Connie Reshard, with regard to this matter?

A Several years ago, and I can't remember the exact year, probably '86 or '87 perhaps, or earlier, it has been that long, I WAS CONTACTED BY Ms. Reshard to review certain records relative to the death of her mother. I discussed those items with her and reviewed the records in her presence briefly, and I might add superficially, and suggested that she seek other experts in the area that I felt were appropriate, specifically cardiology and cardiothoracic surgery. But other than that contact, there has been no other

contact, and specifically there has been no contact since those dated in '86 or '87 until the last week or so.

Q Prior to the last week or so did you provide her with any written reports?

A I can't recall that I did. It's possible that I might have back in those dates in '86 or 87'. I looked through my files yesterday and I could not find them, but I've moved from another office recently and they might have been misplaced. There is a possibility that I might have provided her with some information relative to the overall medical condition, but I don't recall that I did.

* * *

Q Has she since that time been back in touch with you to ask you for a copy of your cv or curriculum vitae.?

A Not that I' m aware of. My contact with her was just briefly during that period in the mid-80s. I don't recall giving her a CV. I might have, but I don't recall, and she has not contacted me for a CV or for any additional information since that date.

Q She hasn't asked you to give her any opinions that she might use to answer interrogatories reciting what she expects your testimony to be?

A No, sir.

* * *

Q Did she discuss with you whether or not you should attend this deposition this morning?
A She suggested that the deposition should be ordered by the judge, and that if the judge ordered it, then I should be available, but under no other circumstances should I be obligated to attend.
Q Did you tell her at that time that you were
not prepared to express an opinion in the case?

A I did.

Q How many days ago was that?

A Probably seven or so, five or seven or 10 days.

****

Q In the conversation that you had with Ms. Reshard where she indicated that if the judge ordered it you should be available for the deposition, did that occur in the conversation five to maybe 10 days ago?

A Yes.
Q. And is that the last time you talked to her?
A Yes.
Q. Mr. Davis asked you a few questions concerning opinions, and I just want to go back for a minute.

Doctor, would it be fair to say that you have not formulated an opinion within a reasonable degree of medical probability

with respect to any of the defendants' care falling below the standard of care?

S. Not at this time.
Q You have not formulated any such opinions?
A I have not.
Q And you have no intent to do so?
A No, I do not.

* * *

Q Yes, sir. Doctor, if Ms. Reshard has represented to the court and to all parties, including counsel, that she has had your input in the course of answering interrogatories, meaning written questions, and that those questions represent your opinions, Doctor, would that be a true and accurate representation on her behalf?
A I don't believe I have given any written opinions.
Q And you have not given any opinions to her verbally which you have authorized her to represent as your opinions?

A Not that I'm aware of.

Q And you would be aware of that, Doctor, if you had done that, wouldn't you?

A I believe I would.

* * **

Q Dr. Britt is a cardiologist, Is it correct that you are not a cardiologist?

A That is correct.

Q And that you would not feel competent from a similar health care provider's standpoint in expressing opinions as to whether Dr. Britt did or did not comply with generally recognized standards of care, would that be so?

A In regard to general medical care I perhaps could provide an opinion, but I am not a cardiologist and therefore any items related to cardiology or the practice of cardiology I would not feel that I would be an expert in that regard.

Q You had no residency in cardiology?

A I am not.

Q If I understand correctly, your primary emphasis is in the area of pharmacology?

A That's correct.

Q So as we sit here today you have no opinions one way or another as to whether Dr. Britt did or did not comply with standards of care as it relates to the care and treatment of Minnie Reshard?

A Particularly, no, I do not.

* * ** *

Q Do you know Dr. Chokhawala?

A I do not.

Q You are of course not a psychiatrist;

is that correct?

A I am not.

Q You are not board certified in that field?

A. No. Sir.

Q And would have no opinion as to the care rendered by Dr. Chokhawala in this matter?

A Absolutely not.

* *

Q Did you have any conversations with her as to whether or not you would be willing to serve as an expert on her behalf?

A I don't recall. I really don't recall. But certainly because I'm not a cardiologist the answer is I probably did not.

* * *

Q You don't have any experience in hospital administration or nursing staff administration. Do you?

A NO.
Q Emergency room administration?

A. I do practice emergency medicine, but not administration.

Q I take it you wouldn't consider yourself an expert in the area of hospital

emergency room or nursing administration as well?

A I would not.

Q You indicated that you recommended that she speak with particularly cardiologist and perhaps some others. Could you tell us who those individuals were to whom you referred her?

A I suggest that she discuss the case with Dr. Reginald Peniston, who is a cardiothoracic surgeon.

Q Do you recall anyone else's name?

A I don't recall.

Q Have you discussed this matter with Dr. Peniston?

A. I have not.
Mr. Davis: Thank you. That's all I have.
Ms. Andrews: One last question.
By Ms. Andrews:

Q Dr. Taylor, would it be fair, sir, to say that you have no intent of testifying as to any of the defendants who have been listed in this litigation as having fallen below the standard of care?

A. I have no intention of testifying, no.

* * *

Q Dr. Bonk is a radiologist. Is that specialty outside your field?

A It is.

Q Did you have an opportunity to review any of the x-ray films of Ms. Reshard's mother?

A I don't recall.

Q And I guess the same question everyone else has asked you, do I assume correctly that you will not be rendering any type of expert medical opinion about the actions of Dr. Bonk, the radiologist?

A I will not.

Id., p.8 lines 2-22, p. 9 lines 1-15, p. 10 line 22, p. 11 lines 1-10, p. 12 lines 14-22, p. 13 lines 1-2, p. 14 lines 9-22, p. 15 lines 1-4, 14-22, p. 16 lines 1-6. 15-22, p. 17 lines 1-16, p. 18 lines 3-10, 20-22, p. 19 lines 1-3, 8-22, p. 20 lines 1-16, 21-22, p. 21 lines 1-9.

In summary, Dr. Taylor denied having any expertise to testify as to cardiology against Defendant Britt, as to psychiatry against Defendant Chokhawala, as to hospital, nursing, or emergency health

care administration against Defendant TCH, or as to radiology against Defendant Bonk. Dr. Taylor said he had no intention of testifying against Defendants in any capacity and had formulated no opinion as to the merits of this case. He could not recall giving information to Ms. Reshard to answer Defendant's interrogatories. He had no copy of any written medical opinion provided to Ms. Reshard in the past. Ms. Reshard had not recently contacted Dr. Taylor for his curriculum vitae as she had been ordered to do by this court. As to attendance at the deposition which this court ordered to take place on July 17, 1990, Dr. Taylor testified that in early July 1990 he told Ms. Reshard that he was not prepared to express an opinion in this case. He also testified that Ms. Reshard told him that under no circumstances

should he attend the deposition unless it was ordered "by the judge."

From this the following findings are made:

1. Ms. Reshard's sworn answer to interrogatory 8 of Dr. Britt that Dr. Taylor had formed an expert opinion as to reading x-rays (radiology), care for a patient with dissecting aorta (cardiology), and standards of care for a hospital, and that he was either retained as or intended to be an expert witness for Plaintiffs in this case was false.

2. Ms. Reshard's deposition testimony that she had Dr. Taylor's agreement to be an expert witness was false. Ms. Reshard' deposition testimony that she answered the Defendants' interrogatory as to the substance of Dr. Taylor's opinion from information received from Dr. Taylor was false.

3. Ms. Reshard's representations to this court on June 29, 1990, that Dr. Taylor had agreed to be Plaintiffs expert witness, that he had formulated an expert opinion, that there was no reason for delay and that he either was ready for his deposition to be taken or could be made ready by July 17th, were false, and Ms. Reshard knew they were false when these untruths were said to this court.

4. Ms. Reshard willfully disobeyed this court's order to make Dr. Taylor available for deposition.

5. Ms. Reshard willfully attempted to obstruct this court's order by instructing Dr. Taylor not to attend the deposition absent an order from "the judge."

Dr. Peniston did not appear at all

for his depositions.[16] It is concluded that Plaintiffs' counsel willfully violated this court's order to make Dr..

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[16] Since counsel for Defendants were together with a court reporter to take Dr. Peniston's deposition on July 18, 1990, when he failed to show up, they called him. The telephone call was transcribed by the court reporter with prior notice to Dr. Peniston. The court entered an order requiring that this transcript be sent to Dr. Peniston, and giving him until December 16, 1990, to tell the court whether the transcript is inaccurate. Docs. 372 and 370. Dr. Peniston promptly replied, and did not advise that the transcript was incorrect in any way. Doc. 374. Dr. Peniston is correct that this was not a deposition, and Defendants' counsel made that clear to him in the telephone conversation. Doc. 374, T 9. Since this transcript is not taken under oath, it has not been relied upon in this report and recommendation. It is noted, however, that if Dr. Peniston's statements in this transcript had been under oath, that is, if he had obeyed the subpoena to appear for his deposition as did Dr. Taylor, the court could have before it Dr. Peniston's statement that Ms. Reshard told him not to attend his scheduled deposition. Doc. 374. T 10. This would be another incident of willful obstruction of this court's order to Plaintiff's attorney.

Peniston available for deposition on July 18, 1990.

IV. Conclusion of Law

Pursuant to Fed.R.Civ.P. 37(b)(2(c), the sanction of dismissal of the action is authorized where a party fails to obey an order to provide or permit discovery. Rule 37(b) provides that an award of expenses, including attorney's fees, caused by the failure to obey a discovery order may be made in addition to or in lieu of other sanctions. Dismissal of an action pursuant to this Rule was affirmed in by the Eleventh Circuit in Aztec Steel Co. v. Florida Steel Corp., 691 F.2d 480 (11th Cir. 1982), cert. denied 460 U.S. 1040 (1983) where the court had twice ordered the Plaintiff to serve adequate answers to interrogatories and he failed a third time to serve adequate answers.

No other improprieties existed. The court noted that the standard for sustaining the sanction of dismissal was whether the party's discovery failure was due to willfulness, bad faith or disregard of responsibilities, or a flagrant disregard for the court and the discovery process. 691 F.2d at 481. See also Properties International Ltd. v. Turner, 706 F.2d 308, 310 (11th Cir. 1983). The court in the Aztec Steel case also ruled that the district court must first consider whether a less drastic sanction would be equally effective. 691 F.2d at 481-82.

In Gates v. United States, 752 F.2d 516 (10th Cir. 1985), dismissal was found to be justified pursuant to Rule 37 upon the failure of Plaintiffs to attend depositions ordered by the court.

The Third Circuit has established guidelines for the balancing interests when a motion for the sanction of dismissal pursuant to Rule 37 is considered. Those interests are:

> (1) The extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Hicks v. Feeney, 850 F.2d 152, 156 (3rd Cir. 1988), cert. denied 109 S.Ct. 786 (1989), quoting Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863, 868 (3rd Cir. 1984) (emphasis by the court).

Dismissal of a case is also authorized by Fed.R.Civ.P. 41(b) for failure of the plaintiff to comply with the Federal Rules of Civil Procedure or

any order of the court. The legal standard for application of this sanction is "whether there is a 'clear record of delay or willful contempt and a finding that lesser sanctions would not suffice.'" Goforth v. Owens, 766 F.2d 1533, 1535 (11th Cir. 1985), quoting Jones v. Graham, 709 F.2d 1457, 1458 (11th Cir. 1983).[17] Dismissal with prejudice is a "a sanction of last resort, applicable only in extreme circumstances." Id. The Eleventh Circuit in the Goforth case also noted that while "dismissal imposes a severe penalty on a client for the misconduct of an attorney," "where any other sanction would fail to cure the harm that the attorney's

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[17] Jones v. Graham indicated that dismissal would be justified if there had been a clear record of delay or willful contempt and a finding that lesser sanctions will not suffice. 709 F.2d at 1458.

misconduct would cause to the defendant, dismissal can be appropriate." Id.

Finally, the sanction of dismissal is authorized by Fed.R.Civ.P. 16(f) where either a party or a party's attorney "fails to obey a scheduling or pretrial order." Of this Rule, the Eleventh Circuit has said that "[t]he sanctions contained in Rule 16(f) were designed to punish lawyers and parties for conduct which unreasonably delays or otherwise interferes with the expeditious management of trial preparation." Goforth v. Owens, 766 F.2d at 1535.

Rule 37(b) should be first considered since many of the problems this case has experienced have been with discovery. The Third Circuit's guidelines in the Hicks case are useful in this context.

In this case, since Plaintiff's

counsel is one of the Plaintiffs, her personal involvement in the events described in this report and recommendation has been complete. This is not a case of unfairly visiting the sins of a lawyer on an innocent client.

Prejudice to the Defendants has been great. Defendants began in 1986 trying to discovery the opinions of those experts Plaintiffs intended to call at trial. They have been hampered at every turn by Plaintiffs' counsels' telephone inaccessibility, numerous spurious motions to block discovery, unilateral cancellation of scheduled depositions, frivolous but lengthy appeals of every order entered by the magistrate, and finally willful disobedience to this court's order that the depositions take place. After all this expense and effort,

Defendants know no more now about what Dr. Peniston's opinion is than they did in 1986.

There has been an extensive history of dilatory behavior by Plaintiffs. It was first noted by an order of this court in 1986. It has continued unabated by the willful timing of baseless motions.

That willful misconduct and bad faith have been the motivating elements has been found in the discussions of fact above. Ms. Reshard has been untruthful under oath twice, in answering interrogatories and in her deposition. More seriously, as counsel for Plaintiffs, she directly lied to this court in response to the court's questions on June 29, 1990. There has been willful disobedience of this court's order that Plaintiffs experts be deposed. Dr. Taylor testified under oath that

Plaintiffs' counsel told him he need not attend, that he could disregard this court's subpoena. This was behavior beyond willful disobedience to an order requiring discovery. It was obstruction of this court's order that discovery occur.

As to the merits of this case, Plaintiffs may have some meritorious claim based upon the opinion of Dr. Peniston, but they have successfully hidden it form the Defendants and the court. Their success in that regard now leaves the record bare since it has been shown that Dr. Taylor provides no support.

Hicks and cases from the Eleventh Circuit especially counsel that this court evaluate whether lesser sanctions will reasonably vindicate the interest which Rule 37 is intended to protect. An award

of expenses including attorney's fees would partially make Defendants whole but would not be adequate on this record. Fair and just trials in this court depend upon a fair discovery process. Willful misconduct taken in bad faith to block fair discovery strikes at the very heart of a fair trial. The central reason for the existence of this court is to provide fair trials to litigants. Financial reimbursement to Defendants is far too little in this circumstance. Punishment and deterrence are essential where a litigant has impeded the right of others to a fair trial and has sought to thwart the fundamental purpose of this court.

An order of contempt as a sanction also contemplated by Rule 37(b), but contempt is not a proper alternative to

dismissal.[18] While the penalties for contempt can be severe, they are personal and not logically connected to the cause at hand. Here Plaintiffs have willfully refused to allow Defendants a fair opportunity to prepare their defenses on the merits. The sanction which this court imposes should be connected with that behavior and the merits of this case, and serve as a deterrent t others who would serve up such roadblocks to a fair trial on the merits.

An order striking pleadings, defenses, or claims, in this context, is much the same as an order of dismissal. While the court might order that Plaintiffs not be allowed to use experts

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[18] That is not to say that contempt proceedings ought not be instituted at all. It is only to say that as a Rule 37 sanction, it is no substitute for dismissal.

at trial, this would effectively be a dismissal since this is a medical malpractice case. Defendants should not be put to the expense of this sort by making necessary motions for summary judgment or trial and directed verdict. Moreover, denial of use of Dr. Taylor at trial would be no sanction at all.

Dismissal of this action with prejudice, therefore, is essential to vindicate the interest protected by Rule 37(b)(2).

Furthermore, since there has been a clear record of delay in this case and willful contempt, and since lesser sanctions will not suffice, dismissal of the action is both authorized and required by Fed.R.Civ.P. 41(b). Dismissal is the proper sanction pursuant to Fed.R.Civ.P. 16(f) as well because both the Plaintiffs

and Plaintiffs attorney have intentionally disobeyed a pretrial order of this court.

Sanctions should include an award of expenses and attorney's fees as well. Every expense caused Defendants from June 18, 1990, when Plaintiffs' counsel determined to miss the scheduling conference without calling defense counsel, to the present should be reimbursed these Defendants. Expenses and attorney's fees should be awarded for all efforts to take the depositions of Drs. Peniston and Taylor, which includes attendance at the June 20, 1990, scheduling conference, responding to all motions filed by Plaintiffs that relate to this issue, responding to all appeals of the magistrate's orders from June 20, 1990 to date, which the court has found to be baseless, and the filing and litigation of

the motions for sanctions and the responses to motions denied in this order. Expenses and attorneys' fees for preparation of motions for summary judgment or for other work in case preparation should not be a part of this sanction, however.

Accordingly it is ORDERED that:

1. Plaintiffs motion to vacate findings of fact, doc. 344, is DENIED.

2. Plaintiffs' motion to strike the deposition of Plaintiff Connie Reshard, doc. 332, is DENIED.

3. Plaintiffs' motion to strike Defendants' notice of taking of depositions duces tecum, which were scheduled for July 17 and 18, 1990, in Washington, D.C., doc. 254, is DENIED.

it IS FURTHER RECOMMENDED:

1. That Defendants' motions for

sanctions, docs. 273, 279, 280, 290, and 297, be GRANTED.

2. That as a sanction pursuant to Fed.R.Civ.P. 37(b)(2(C), 41(b), and 16(f) the court DISMISS the complaint in this case with prejudice, retaining jurisdiction to award as an additional sanction expenses and attorneys' fees.

3. That as a sanction pursuant to Fed.R.Civ.P. 37(b)(2)(C), 41(b), and 16(f) the ORDER that the Plaintiffs' and Plaintiffs' counsel shall pay to Defendants their expenses, including attorneys' fees, for all work and expenses related to their attempts to take the depositions of Drs. Peniston and Taylor from June 18, 1990, to date, including without limitation attendance at the June 20, 1990, scheduling conference, responses to all motions filed by Plaintiffs that

relate to this issue, responses to all appeals of the magistrate's orders from June 20, 1990, to date, attempts to communicate with Plaintiffs as to this question, and the filing and litigation of the motions for sanctions and the responses to motions denied in this order.

4. That the court REMAND this case to the magistrate for entry of an order as to the amount of expenses and attorneys' fees awarded.

5. Title 28 U.S.C. § 636 and Local Rule 27(B) of this Court permit any party to object to these proposed findings, recommendations or report within ten (10) days after being served with a copy thereof. The time for filing such objections is hereby extended to forty (40) days from the date of entry of this order on the docket. **Objections shall be**

in writing, specifically identify the portions to which objection is made, and state the basis for such objections. Objections shall be filed with the Clerk of the Court, and copies shall be served on the magistrate and all other parties. A party may respond to another party's objections within thirty (30) days after being served with a copy thereof. **Defendants are encouraged, but not required, to file one consolidated response.** Failure to object to this report and recommendation prior to the district court's acceptance and adoption of the report and recommendation limits the scope of appellate review of factual findings. U.S. v. Slay, 714 F.2d 1093 (11th Cir. 1983), cert. den[ied], 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984); Thomas v. Arn, 474 U.S. 140, 106

S.Ct. 466, 88 L.Ed.2d 435 (1985).

In CHAMBERS at Tallahassee, Florida, this 14th day of December, 1990.

/s/
WILLIAM SHERRILL, JR.
UNITED STATES MAGISTRATE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONNIE RESHARD AND LEROY RESHARD,

PLAINTIFFS,

VS. TCA 85-7216-

WS

DR. EARL BRITT, et al.,

DEFENDANTS.

_____/

O R D E R

[OMITTED TEXT]

ORDERED that:

1. Plaintiffs' emergency motion for

a protective order as to depositions, doc. 107, is DENIED. The parties shall reschedule these depositions to occur within thirty (30) days from the date of entry of this order on the docket.

[REMAINING TEXT OMITTED] R -184-3.

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28 U.S.C.A. § 636: Notwithstanding any provision of law to the contrary --

> **(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to**

dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, inlcuding evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of perisoner

petitions challenging conditions of confinement.

(C) the magisrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the

matter to the magistrate with instructions.

28 U.S.C. § 753(b)

The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them for the public records of the court for not less than ten years.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during ofice hours to inspection by any person without charge.

28 U.S.C.A. § 1254: "Cases in the courts of appeals may be reviewed by the Supreme Court following methods: (1) By writ of certiorari granted upon the petition of

any party to any civil or criminal case, before or after rendition of judgment or decree . . . ."

28 U.S.C.A. § 1291: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

28 U.S.C.A. § 1332: Diversity of Citizenship; amount in controversy; costs. (a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between --

(1) citizens of different States . . . .

FEDERAL RULES OF APPELLATE PROCEDURE

RULE 4: "(a)(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of

appeals the notice of appeal shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from . . . (4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured

from the entry of the order disposing of the motion as provided above. . . (7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

RULE 10: (A) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases . . .(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and

the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 11: Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one

attorney of record in the attorney's individual name, whose address shall be stated . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or

movant. If a pleading, motion , or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

RULE 16:

(a) **Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as**

(1) expediting the disposition of the

action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation, and;

(5) facilitating the settlement of the case.

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other

suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order also may include

(4) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of good cause.

(c) **SUBJECTS TO BE DISCUSSED AT PRETRIAL**

CONFERENCES. The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and

the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a magistrate or master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each

party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(f) SANCTIONS. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just,

and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust. Fed.R.Civ. Proc. 16 28 U.S.C. A.

(West 1992).

RULE 26

(a) **Discovery Methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents

or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) **Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents,or other tangible things and the identity and location of persons having knowledge of

any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the

parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(3) **TRIAL PREPARATION: MATERIALS.** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety. indemnitor, insurer, or agent) only upon showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue

hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37 (a)(4) apply to the award of

expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4)**TRIAL PREPARATION: EXPERTS.** Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at

trial, to state the subject matter on which the expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and

who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair

portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) **Protective Orders.** Upon motion by a party or by the person from who discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had

only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are

just, order that any party or person provide or permit discovery. The provisions of Rule 37 (a)(4) apply to the award of expenses incurred in relation to the motion.

(d) **SEQUENCE AND TIMING OF DISCOVERY.** Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) **SUPPLEMENTATION OF RESPONSES.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as

follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a

failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior responses.

(g) **SIGNING OF DISCOVERY REQUESTS, RESPONSES AND OBJECTIONS.** Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney or record in the attorney's individual name, whose address shall be stated. A party who is not represent by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that

to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or

objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

RULE 30

(b) **notice of examination: general requirements; special notice; non-Stenographic Recording; Production of Documents and Things; Deposition of**

Organization; Deposition by Telephone.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read

to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substances which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of the submission to the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given

therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(g) **Failure to Attend or to Serve Subpoena; Expenses.**

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness

fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

RULE 32

(b) **Objections to Admissibility.** Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and

testifying.

(e) **Effect of Errors and Irregularities in Depositions.**

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

RULE 33. Interrogatories to Parties:

(a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers

are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) Scope; Use at trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the

extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or

summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

RULE 34: Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents . . .

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is

served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested

. . . .

RULE 37

FAILURE TO MAKE OR COOPERATE IN DISCOVERY: SANCTIONS

(a) **MOTION FOR ORDER COMPELLING DISCOVERY.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) **Appropriate Court.** An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) **Motion.** If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in

whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) **Evasive or Incomplete Answer.** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) **Award of Expenses of Motion.** If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to t he motion was substantially justified or that other circumstances make an award

of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) **Failure to Comply With Order.**

(1) **Sanctions by Court in District Where Deposition is Taken.** If a deponent

fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) **Sanctions by Court in Which Action is Pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30 (b)(6) or 31(a) to testify on behalf of a party fails to obey made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to

be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A),(B), and (C) of this subdivision, unless the party failing to comply shows that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to

Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30 (b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this

rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

RULE 41

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move

for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

RULE 52: Findings by the Court; Judgment on Partial Findings. (a) Effect. In all actions tried upon the facts without the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its

action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . . .

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has

made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

RULE 59:

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

RULE 60: (B) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On a Motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly

discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not

affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court . . . .

RULE 72: Magistrates; Pretrial Matters

(a) Nondispositive Matters. A magistrate to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate's order, a party

may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law.

(d) Dispositive Motions and Prisoner Petitions. A magistrate assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate, and a record may be made of such other proceedings as the magistrate

deems necessary. The magistrate shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy thereof. The district

judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate with instructions.

Florida Statutes

Section 395.002 Definitions

(1) "Accrediting organizations" means the Joint Commission on Accreditation of Health care Organizations, the American Osteopathic Association, the Commission on Accreditation of Rehabilitation Facilities, and the Accreditation Association for Ambulatory Health Care,

Inc.

(8) "Emergency medical condition" means:

(a) A medical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain, such that the absence of immediate medical attention could reasonably be expected to result in any of the following:

1. Serious jeopardy to patient health, including a pregnant woman or fetus.

2. Serious impairment to bodily functions.

3. Serious dysfunction of any bodily organ or part.

(9) "Emergency services and care" means medical screening, examination, and evaluation, and evaluation by a physician, or, to the extent permitted by applicable law, by other appropriate personnel under

the supervision of a physician, to determine if an emergency medical condition exists and, if it does, the care, treatment, or surgery by a physician necessary to relieve or eliminate the emergency medical condition, within the service capability of the facility.

395.009: Minimum standards for clinical laboratory test results and diagnostic x-ray results

(2) Each licensed facility, as a requirement for issuance or renewal of its license, shall establish minimum standards for acceptance of results of diagnostic X-rays performance by or for the licensed facility.

395.1041 (c) A patient, whether stabilized or not, may be transferred to another hospital which has the requisite service capability or is not at service capacity,

if:

(d)1. Every hospital shall ensure the provision of services within the service capability of the hospital, at all times, either directly or indirectly through an arrangement with another hospital, through an arrangement with one or more physicians, or as otherwise made through prior arrangements.

Section 395.1046 Complaint investigation procedures.

395.302 Patient records; penalties for alteration

(1) Any person who fraudulently alters, defaces, or falsifies any medical record, or causes or procures any of these offenses to be committed, commits a misdemeanor of the second degree, punishable as provided in § 7765,082 or § 775.083.

395.3025 Patient and personnel records; copies; examination: (1) Any licensed facility shall, upon written request, and only after discharge of the patient, furnish, in a timely manner, without delays for legal review, to any person admitted therein for care and treatment or treated thereat, or to any such person's guardian, curator, or personal representative, or in the absence of one of those persons, to the next of kin of a decedent or the parent of a minor, or to anyone designated by such person in writing, a true and correct copy of all patient records, including x-rays, and insurance information concerning such person, which records are in the possession of the licensed facility, provided the person requesting such records agrees to pay a charge. ... The

licensed facility shall further allow any such person to examine the original records in its possession, or microforms or other suitable reproductions of the records, upon such reasonable terms as shall be imposed to assure that the records will not be damaged, destroyed, or altered.

Section 395.3015. Patient records; form and content

Each hospital operated by the agency . . . shall require the use of a system of problem-oriented medical records for its patients, which system shall include the following elements: basic client data collection; a listing of the patient's problems; the initial plan with diagnostic and therapeutic orders as appropriate for each problem identified; and progress notes, including a discharge summary. The

agency shall, by rule, establish criteria for such problem-oriented medical record systems in order to ensure comparability among facilities and to facilitate the compilation of statewide statistics.

768.16 Wrongful Death Statute

768.17 Legislative intent

It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. Sections 768.16 -768.27 are remedial and shall be liberally construed.

768.19 Right of action

When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an

action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

768.20 Parties

The action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death. . . .

768.21 Damages

All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint, and their relationships to

the decedent shall be alleged. . . .

768.18 Definitions

(1) "Survivors" mean the decedent's spouse, children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. . . .

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
CASE NO. TCA 85-7216

RESHARD,
PLAINTIFFS,
V
BRITT, et al.,
DEFENDANTS.

APRIL 12, 1990

MOTIONS HEARING
BEFORE THE HONORABLE WILLIAM SHERRILL, JR.

APPEARANCES:
CONNIE RESHARD, PRO SE
WILLIAM M. SMITH, ESQUIRE
STEVEN SEYMOE, ESQUIRE
JOHN L. FISHEL, ESQUIRE
WILLIAM H. DAVIS, ESQUIRE
MURRAY WADSWORTH, ESQUIRE
JEANNETTE ANDREWS, ATTORNEY AT LAW
RICHARD COLLINS, ESQUIRE

JAMES TRUETT, ESQUIRE

COURT REPORTER:

R. DARLENE PINO, OFFICIAL COURT REPORTER

TRANSCRIPT

PAGE 99, BEGINNING WITH LINE 7 AND ENDING ON PAGE 102, AT LINE 7:

MAGISTRATE SHERRILL: ALL RIGHT, WHAT IS THE BASIS OF OBJECTING TO DEPOSITIONS OF THE TWO FAMILY MEMBERS.

MS. RESHARD: YOUR HONOR.

MAGISTRATE SHERRILL: I HAVE READ THE OBJECTION AND IT WAS A SCHEDULING PROBLEM AS I REMEMBER. BUT IS THERE ANY SUBSTANTIVE BASIS FOR THE --

MS. RESHARD: WELL, YES, YOUR HONOR, THERE WERE SUBSTANTIVE BASES.

PLAINTIFFS HAVE ANSWERED HIM [DEFENDANT] IN WRITTEN INTERROGATORIES, AND SUBSTANTIVELY DIDN'T WANT TO BE INVOLVED IN GIVING IMPRESSIONS THAT WERE PART OF

THE WORK PRODUCT DURING THE COURSE OF SUCH DISCOVERY.

MAGISTRATE SHERRILL: WHO'S WORK PRODUCT?

MS. RESHARD: PLAINTIFFS.

MAGISTRATE SHERRILL: WORK PRODUCT IS AN ATTORNEY'S PRIVILEGE PRIMARILY.

MS. RESHARD: THAT IS CORRECT. AND I AM AN ATTORNEY, AND I AM REPRESENTING MYSELF PRO SE. AND BASICALLY, WHEN WE WERE REPRESENTING OURSELVES PRO SE, WE WERE BASICALLY IN THE DEPOSITION OF WHERE WE WOULD BE PLACED IN THAT KIND OF A SETTING. HOWEVER, IT APPEARED THAT THE INFORMATION HAD BEEN VERY THOROUGH WITH RESPECT TO THE WRITTEN INTERROGATORIES THAT HAD BEEN REQUESTED.

MAGISTRATE SHERRILL: ALL RIGHT. THIS IS A PRETTY SIMPLE ONE. YOU MAY HAVE A SEAT.

MS. RESHARD: YES, YOUR HONOR.

MAGISTRATE SHERRILL: I AM GOING TO READ

YOUR MOTION CAREFULLY BE SURE THERE IS NOT SOMETHING LURKING IN IT THAT I NEED TO TAKE CARE OF, BUT I AM INCLINED TO DENY THE MOTION FOR PROTECTIVE ORDER, BECAUSE IT'S PRETTY FUNDAMENTAL THAT A PARTY OR ANYBODY FAIRLY CLOSE TO A PARTY CAN BE SET DOWN FOR A DEPOSITION. INTERROGATORIES ARE NEVER SUFFICIENT FOR THAT.

IF YOU HAVE WORK PRODUCT OBJECTIONS, THE PROPER WAY TO GO ABOUT THAT IS TO OBJECT ON THE RECORD AT THE DEPOSITION.

MS. RESHARD: YES.

MAGISTRATE SHERRILL: THOSE ARE JUST RESPONDING TO WHAT YOU SAID NOW, I AM NOT GOING TO RULE, ON THAT.

MS. RESHARD: I UNDERSTAND, I JUST NEEDED TO MAKE A STATEMENT FOR THE RECORD THAT SOMEHOW I DIDN'T GET IN A THE CLOSE OF THE OTHER CASE.

MAGISTRATE SHERRILL: IN THE CLOSE OF

WHICH OTHER CASE?

MS. RESHARD: THE DISQUALIFICATION MOTION THAT IS CORRECT.

MAGISTRATE SHERRILL: IT FURTHER ARGUMENT ON THAT MOTION?

MS. RESHARD: NO, IT'S NOT FURTHER ARGUMENT, IT'S SIMPLY A STATEMENT OF REITERATING MY OBJECTION SPECIFICALLY CLARIFYING THE DOCUMENTS THAT YOU MENTIONED, WHICH SOME HOW, HAS BEEN CONFUSED, THAT IS ALL. BECAUSE THERE IS A DOCUMENT.[DR. CHOKHAWALA'S CLINICAL RESUME.]

AND SO, BASED UPON YOUR GENERAL CONCLUSIONS, I JUST WANT TO ENTER, AT THIS POINT IN TIME, THAT I WILL FILE A MOTION OF RECONSIDERATION, AND SPECIFICALLY CLARIFYING THE INFORMATION THAT WAS INTENDED BUT WAS CONSTRUED DIFFERENTLY, AND MAYBE IT IS THE WAY I PRESENTED IT.

MAGISTRATE SHERRILL: ALL RIGHT. HAVE A SEAT, PLEASE.

MS. RESHARD: THANK YOU.

MAGISTRATE SHERRILL: WHEN YOU FILE YOUR MOTION FOR REHEARING, YOU MUST GIVE A GOOD CAUSE FOR NOT PRESENTING ANY EVIDENCE THAT YOU PRESENTED TODAY. AND PLEASE DIRECT YOURSELF TO THAT WHEN YOU ASK FOR A REHEARING OF THE HEARING WE HAD TODAY.

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AFFIDAVIT OF LEROY RESHARD JULY 29, 1990

3156 WEYMOUTH DRIVE
MARIETTA, GEORGIA 30062

[AT THE TIME OF THIS AFFIDAVIT, LEROY RESHARD WAS 44 YEARS OLD AND A SENIOR ACCOUNT EXECUTIVE WITH A FORTUNE 100 CORPORATION.]

A. ON TEUSDAY MORNING AUGUST 2, 1983, I SPOKE (BY TELEPHONE) TO DR. EARL BRITT ABOUT MY MOTHER, MINNIE LEE RESHARD,

CONCERNING HER ILLNESS. AT THAT TIME, I LIVED IN IRVINE, CALIFORNIA.

I ASKED DR. BRITT WHAT WAS WRONG.

DR. BRITT STATED THAT HE THOUGHT THAT MOTHER WAS DEPRESSED.

I ASKED ABOUT WHAT.

DR. BRITT STATED THAT HE WOULD OBSERVE HER AND RUN DIFFERENT TEST TO DETERMINE WHAT WAS WRONG.

B. I SPOKE TO DR. BRITT AGAIN ON THURSDAY AUGUST 4, 1983 TO OBTAIN RESULTS OF TEST AND PROGRESS ON MY MOTHER.

DR. BRITT SAID THAT THERE WAS NOT ANYTHING THAT HE COULD SEE WAS WRONG.

C. DURING THE COURSE OF MY MOTHER'S HOSPITAL STAY, FROM AUGUST 2, 1983 THRU AUGUST 6, 1983, I SPOKE TO HER THREE TIMES.

ON AUGUST 2, 1983, MY MOTHER EXPLAINED ABOUT THE CHEST PAIN THAT HAD BROUGHT HER

TO THE HOSPITAL. SHE SAID THAT SHE HAD PAIN IN HER CHEST WHICH HAD WOKE HER UP; THAT THE PAIN HAD SPREAD TO HER ARMS AND LEGS AND THEN ALL OVER HER BODY.

ABOUT 9:00 P.M. EST ON AUGUST 5, 1983, I SPOKE TO MOTHER AGAIN AND SHE FELT BETTER.

D. ON AUGUST 6, 1983, AFTER LEARNING OF MY MOTHER'S DEATH, I FLEW TO TALLAHASSEE EARLY SUNDAY MORNING AUGUST 7, 1983. I WENT DIRECTLY TO THE HOSPITAL. CONNIE (MY SISTER) WAS ALREADY THERE.

I TALKED TO DR. BRITT. I ASKED HIM WHAT HAD HAPPEN? DR. BRITT ACTED AT A LOSS AS WHAT HAPPEN TO CAUSE MY MOTHER'S DEATH. DR. BRITT HAD NOT DETERMINED A DIAGNOSIS.

I [ASKED] WHAT WAS THE TREATMENT?

DR. BRITT SAID HE HAD GIVEN NITROGLYCERIN EVERYDAY AT 6:00 A.M., EKG TEUSDAY IN EMERGENCY ROOM, MONITORING DEVICE, SERUM BLOOD ANALYSIS.

I ASKED WHEN AND WHY WAS SHE TAKEN OFF THE MONITOR.

DR. BRITT SAID THE EKG WAS NORMAL, EVERYTHING WAS NORMAL AND OTHER PATIENTS NEEDED THE MONITORING DEVICE MORE THAN SHE DID. HE SAID THE DEVICE HAD BEEN TAKEN OFF ON THURSDAY, AUGUST 4, 1983.

DR. BRITT SAID HER BLOOD PRESSURE WAS UP AND DOWN BUT NOTHING TO BE CONCERNED ABOUT.

A MS. JENNY SHEPARD, SUPERVISING NURSE STATED THAT MY MOTHER HAS [HAD] BEEN FOUND DEAD ABOUT 6:00 A.M.[AUGUST 6, 1983], DR. BRITT HAD BEEN CALLED AT 6:05 A.M. AND AGAIN AT 6:27 A.M. (THE TIME THE HOSPITAL RECORDED HER DEATH). DR. BRITT ACTUALLY ARRIVED AT THE HOSPITAL AT ABOUT 8:30-9:00 A.M.

I WANTED TO REVIEW THE BODY. I DID SO.

DR. JERRY HARRIS, THE PATHOLOGIST AND

MEDICAL EXAMINER ARRIVED ABOUT 10:15 A.M. IN ORDER TO DO THE AUTOPSY. (8/7/83)[1]

I AUTHORIZED AN AUTOPSY TO BE PERFORMED FOR ONE PURPOSE, TO DETERMINE THE CAUSE OF DEATH. NO ONE EXPLAINED THAT ORGANS WERE TO BE REMOVED OR ANYTHING ELSE. NO COPY OF THE AUTOPSY AUTHORIZATION WAS GIVEN TO ME.

CONNIE AND I WAITED FOR DR. HARRIS TO PERFORM THE AUTOPSY AND MET WITH DR. HARRIS, DR. BRITT, AND JENNY SHEPARD AFTER THE AUTOPSY HAD BEEN PERFORMED. DR. BRITT ATTENDED THE PERFORMANCE OF THE AUTOPSY. IMMEDIATELY AFTER THE AUTOPSY WAS PERFORMED, DR. BRITT CAME OUT FIRST. HE

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1 DR. HARRIS EXPLAINED THAT HE WAS A STATE MEDICAL EXAMINER AND THAT THE STATE PROVIDED THE COMMISSION OF AN AUTOPSY AS A PUBLIC SERVICE. HIS ORGANIZATION HAD BEEN AUTHORIZED AS MEDICAL EXAMINERS. HE HELD HIMSELF OUT AS A MEDICAL EXAMINER FOR THE STATE OF FLORIDA.

STATED TO US, (CONNIE , MS. SHEPARD AND MYSELF) THAT THE CAUSE OF DEATH WAS KNOWN AS SOON AS THE BODY WAS CUT OPEN. THERE IT LAY -- THE HEART AND SAC FILLED WITH BLOOD. SHE HAD AN ANEURYSM RUPTURE INTO THE PERICARDIUM.

DR. HARRIS AND DR. BRITT EXPLAINED FURTHER. ONE OF THEM DREW A DIAGRAM (ATTACHED) ON A SHEET OF PAPER FROM MY NOTE PAD AND WROTE THE CAUSE OF DEATH DOWN AS WELL. I TOOK NOTES. SHE HAD A DISSECTION OF THE AORTA, HEMOPERICARDIUM WITH CARDIAC TAMPONADE. A HEART MODEL WAS ALSO USED TO SHOW THE LOCATION OF THE ANEURYSM WAS CONFINED TO THE ASCENDING AORTA.

DR. BRITT SAID THAT NOTHING COULD BE DONE TO SAVE MY MOTHER'S LIFE. HE SAID THAT PATIENTS DIE 80 PERCENT OF THE TIME. HE SAID THAT THE ANEURYSM COULD NOT BE SEEN

ON A PLAIN X-RAY AND HER CHEST X-RAYS HAD BEEN NORMAL AND TO ASSURE HIMSELF, HE HAD A SECOND SET OF X-RAYS ON AUGUST 2, 1983. HIS STATEMENTS REFLECTED THAT THE HAD READ THE X-RAYS HIMSELF. HE SAID AN ANGIOGRAM WAS THE ONLY WAY TO HAVE DETERMINED THE EXISTENCE OF THE ANEURYSM, BUT THERE WAS NO REASON TO DO AN ANGIOGRAM BECAUSE EVERYTHING WAS NORMAL.

MY SISTER, CONNIE WAS CONCERNED THAT A WOMAN WITH A LONG HISTORY OF HYPERTENSION WHO HAD SEVERE CHEST PAIN WOULD NOT WARRANT FURTHER TEST AFTER A HEART ATTACH [ATTACK] WAS RULED OUT.

DR. BRITT REPEATED THAT NO FURTHER TEST WERE WARRANTED AND HOW WAS HE SUPPOSED TO KNOW SINCE HE HAD NOT SEEN HER SINCE APRIL 1983. DR. BRITT HAD CONTINUED TO MAINTAIN DURING THIS MEETING THAT MOTHER HAD JUST BEEN DEPRESSED.

I WAS CONVINCED THAT MY MOTHER'S MEDICAL NEEDS HAD BEEN IGNORED AND SHE HAD SIMPLY BEEN LABELED AS BEING DEPRESSED.

THROUGH-OUT THIS MEETING, DR. HARRIS NOR DR. BRITT DID NOT MENTION THAT THEY HAD REMOVED MY MOTHER'S HEART.

THE COMPLETE AUTOPSY WAS NOT PERFORMED. DR. HARRIS STATED THAT THE CAUSE OF DEATH HAD BEEN DETERMINED AND NO FURTHER INFORMATION WAS LIKELY. A WRITTEN REPORT WOULD BE ISSUED.

CONNIE WANTED A DRUG ANALYSIS DONE, BUT DR. HARRIS SAID THAT NONE WAS NEEDED. CONNIE WANTED TO SEE THE ACTUAL HEART OF OUR MOTHER, BUT THEY WOULD NOT SHOW IT TO HER.

I REQUESTED THE HOSPITAL RECORDS AND X-RAYS BUT DID NOT GET THEM AT THAT TIME. WE WERE TOLD TO RETURN ON AUGUST 8, 1983.

D. KEMUEL COX, THE MORTICIAN MET WITH

CONNIE AND I SOMETIME THE WEEK OF AUGUST 7, ABOUT THE FUNERAL ARRANGEMENTS.

MR. COX STATED THAT SOMETHIN [SOMETHING] WAS UNUSUAL ABOUT THE CONDITION OF MY MOTHER'S BODY. THE HEART HAD BEEN REMOVED AND SOME THINGS WERE 'CHOPPED-UP."

MR. COX ASKED WHAT SHE DIED FROM.

WE TOLD HIM WHAT HAD BEEN TOLD TO US. MR. COX SUGGESTED THAT WE SPEAK TO DR. HARRIS AGAIN AND HE ARRANGED A MEETING.

JAMES RESHARD (ANOTHER BROTHER), CONNIE, MR. COX AND I MET WITH DR. HARRIS AT HIS OFFICE, I BELIEVE ON AUGUST 11, 1983. MR. COX REPEATED WHAT HE HAD TOLD US AS THE REASON FO[R] CALLING THE MEETING.

DR. HARRIS ACKNOWLEDGED THAT HE HAD REMOVED THE HEART. HE NEVER GAVE A REASON FOR REMOVING IT. CONNIE ASKED WHY AND DEMANDED TO SEE THE HEART. DR. HARRIS SAID NO. JAMES ASKED SOME QUESTIONS.

DR. HARRIS REPEATED ESSENTIALLY WHAT HE HAD SAID ON AUGUST 7, 1983. THE ANEURYSM HAD BEEN LOCATED IN THE ASCENDING AORTA JUST ABOVE THE HEART. IT HAD RUPTURED AT THE BASE OF THE AORTA, FILLING THE HEART SAC WITH BLOOD, CAUSING CARDIAC ARREST AND DEATH.

E. DURING THE WEEK OF AUGUST 7, 1983, JAMES ACCOMPANIED ME TO PICK UP THE X-RAYS AND RECORDS. I HAVE X-RAYS AND HOSPITAL RECORDS LISTED AS WHAT I REQUESTED, BUT MS. SHEPARD DID NOT GIVE US THE X-RAYS, JUST A COPY OF THE HOSPITAL RECORDS. (I AM AWARE THAT THE SET OF RECORDS I FIRST RECEIVED FROM THE HOSPITAL AT THIS TIME AND A SET THAT CONNIE WOULD OBTAIN LATER ARE DIFFERENT.)

IN THE HOSPITAL RECORDS, THERE WAS A ONE PAGE TYPEWRITTEN REPORT WHICH HAD BEEN PREPARED BY A PSYCHIATRIST, DR.

CHOKHAWALA. I DO NOT RECALL THE SPECIFIC CONTENTS, BUT THE REPORT HAD BEEN BASED ON SEVERAL VISITS WITH MY MOTHER.

THE WEEK AFTER THE FUNERAL,[2] AUGUST 14, 1983, CONNIE AND I MET WITH A ELWIN THRASHER ABOUT PROBATE OF THE ESTATE AND CONCERNS ABOUT MY MOTHER'S DEATH. OUR AUNT TOMMYE LEE CARR WAS WITH US BUT REMAINED UN THE CAR. I GAVE MR. THRASHER MY FOLDER WHICH CONTAINED THE HOSPITAL RECORDS, INCLUDING THE PSYCHIATRIST TYPEWRITTEN REPORT MENTIONED JUST ABOVE. ALSO, INCLUDED, WAS THE ORIGINAL MEDICAL FORM FOR THE FLORIDA RETIREMENT SYSTEM. THIS FORM HAD BEEN COMPLETED BY DR. EARL BRITT. CONNIE HAD GIVEN IT TO ME BECAUSE I HAD INTENDED TO WRITE DR. EARL BRITT A

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[2] THRASHER IS AN ATTORNEY. IT WAS APPARENT DURING OUR MEETING WITH THRASHER THAT HE KNEW DR. CHOKHAWALA. CONNIE HAD BEEN VERY CONCERNED ABOUT DR. CHOKHAWALA'S INVOLVEMENT IN MOTHER'S CASE.

LETTER. [ABOUT THE CONTENTS OF THE DOCUMENT WHICH CONTRADICTED WHAT HE HAD TOLD LEROY ON AUGUST 7, 1983 ABOUT THE HISTORICAL MEDICAL DIAGNOSIS HE HAD MADE REGARDING THE DECEDENT DURING THE COURSE OF HIS MEDICAL TREATMENT.] THE INFORMATION REGARDING MY MOTHER'S CARDIOVASCULAR DISEASE IN THIS REPORT WHICH HAD BEEN EXECUTED IN 1983 WAS INCONSISTENT WITH DR. BRITT'S ASSESSMENT REGARDING MY MOTHER'S CARDIOVASCULAR HEALTH AT THE TIME OF HER DEATH ON AUGUST 7, 1983. IT WAS ALSO IN MY FILE, THE ONE GIVEN TO ELWIN THRASHER. THIS FORM AND DR. CHOKHAWALA'S TYPEWRITTEN REPORT DISAPPEARED FROM FILE AFTER THE MEETING WITH THRASHER. WE NOTED THAT THRASHER HAD DEPT THE DOCUMENTS.

LATER, CONNIE WOULD MENTION THE DISAPPEARANCE OF THE CHOKHAWALA DOCUMENT

FROM THE OFFICIAL HOSPITAL FILE AFTER SHE REVIEWED THE HOSPITAL RECORDS A COUPLE OF WEEKS AT THE END OF AUGUST 1983.

CONNIE ASKED ME TO ASK THRASHER ABOUT IT BUT HE DENIED TAKING ANY OF THESE RECORDS. CONNIE ALWAYS EXPRESSED CONCERN THAT THRASHER WAS DELIBERATELY STALLING ON REVIEWING THE MEDICAL RECORDS AND THAT THE DELAY WOULD HURT US. SHE EXPRESSED CONCERNS THAT HIS CONDUCT WAS LEGALLY UNETHICAL. HE DID NOT REVIEW THE RECORDS UNTIL JANUARY 1984 AND DID NOT ASK FOR THE X-RAYS.

ADDITIONALLY, DURING MY DEPOSITION ON JUNE 27, 1990, THE LAWYERS FOR THE DEFENDANTS PRESENTED SEVERAL DIFFERENT DOCUMENT TO ME, BUT NONE WAS THE REPORT WHICH HAD BEEN IN THE MEDICAL RECORDS PREPARED BY DR. CHOKHAWALA.

I WOULD BE HAPPY TO SUBMIT TO A POLYGRAPH

TEST. [I ASKED THAT THIS STATEMENT BE ADDED IN ORDER TO SUBMIT THE DOCUMENTS TO THE STATE OF FLORIDA MEDICAL REGULATORS BECAUSE SUCH TEST CAN BE SUBMITTED IN THE ADMINISTRATIVE RECORDS. PER CONNIE RESHARD]

SWORN BEFORE ME _____ ON JULY 30 1990. /S/ROSE ANN WILCOX _____

__/S/_____NOTARY PUBLIC,

LEROY RESHARD

GEORGIA STATE AT LAWS

ATTACHMENT

AFFIDAVIT OF JAMES RESHARD

ADDRESS: 194 RUSHMORE STREET

WESTBURY, NEW YORK

DATED JULY 21, 1990

PAGE ONE OF TWO

A. THE FIRST TIME I SPOKE TO MY MOTHER, MINNIE LEE RESHARD, DURING HER ILLNESS WHICH BEGAN ON AUGUST 2, 1983 TO AUGUST 6,

1983, WAS AUGUST 3, 1983. IT WAS ABOUT 3 O'CLOCK P,M. WHEN I TELEPHONED HER FROM NEW YORK AT TALLAHASSEE COMMUNITY HOSPITAL IN TALLAHASSEE, FLORIDA.

I ASKED HER HOW SHE FELT.

SHE SAID THAT A PSYCHIATRIST HAD BEEN TO SEE HER AND TREATED HER LIKE SHE WAS CRAZY. THE PSYCHIATRIST HAD ATTEMPTED TO GIVE HER A TEST. HE ASKED HER HOW BIRDS FLY. SHE TOLD HIM HOW MUCH PAIN SHE WAS HAVING AND REFUSED TO TALK TO HIM.

WE TALKED A LITTLE BIT MORE, BUT WHAT PUZZLED ME WAS THAT A PSYCHIATRIST WAS TRYING TO GIVE HER A TEST WHILE SHE KEPT TELLING HIM SHE WAS IN PAIN.

B. ON AUGUST 5, 1983, I HAD THE FOLLOWING TELEPHONE CONVERSATION WITH MY MOTHER DURING VISITING HOURS, ABOUT 7:30 P.M. MY UNCLE THOMAS RESHARD, JR., HIS WIFE, ERNESTINE RESHARD, AND MY

GRANDFATHER, THOMAS RESHARD, SENIOR WERE VISITING:

I ASKED MY MOTHER HOW SHE FELT.

SHE SAID THAT SHE HAD SO MUCH PAIN THAT SHE DID NOT THINK SHE WOULD HAVE MADE IT [DIED], BUT THE DOCTOR HAD GIVEN HER MEDICINE FOR THE PAIN. SHE DID NOT HAVE ANY PAIN AT THAT TIME, BUT WAS SOUNDING VERY DROWSY. WE DID NOT TALK LONG. THE FOLLOWING MORNING, AUGUST 6, 1983, MY UNCLE, DENNIS RESHARD, TELEPHONED ME THAT MY MOTHER HAD DIED.

C. WHILE IN TALLAHASSEE, THE WEEK OF AUGUST 7, 1983 99TH, 10TH, 11TH), I WENT WITH LEROY RESHARD TO THE HOSPITAL (TALLAHASSEE COMMUNITY HOSPITAL) TO PICK-UP MY MOTHER'S MEDICAL RECORDS AND WE WERE TOLD THAT THE MEDICAL RECORDS WERE NOT READY YET. WE RETURNED THE NEXT DAY. THIS TIME THE RECORDS WERE GIVEN TO US,

BUT SOME PAGES WERE NOT GIVEN. I DO NOT KNOW WHAT PAGES WERE KEPT BY THE BLOND HAIRED WOMAN. SHE ALSO RECOPIED SOME PAGES WHICH WERE NOT CLEAR.

D. LATER, MY SISTER AND BROTHERS WERE TOGETHER BEFORE I LEFT FLORIDA AFTER MY MOTHER HAD PAST. WE DISCUSSED A ONE PAGE DOCUMENT WHICH HAD BEEN PREPARED BY THE PSYCHIATRIST. MY SISTER CONNIE RESHARD, HAD READ THE REPORT AND WAS HOLDING IT IN HER HAND. SHE SAID THAT THE DOCTOR HAD CONCLUDED MY MOTHER WAS CRAZY. I WAS SHOCKED ABOUT ANYONE SAYING MY MOTHER [WAS] CRAZY. MY MOTHER DROVE AUNT MABLE SMITH TO WORK EVERY DAY. SHE DID HOUSE WORK AND KEPT MY SISTER'S BRENDA KID AS WELL AS MY SISTER BELINDA'S TWO KIDS. CONNIE SAID OVER AND OVER HOW COULD HE WRITE THIS AND WAS SCREAMING. THIS PAPER HAD BEEN IN THE MEDICAL RECORDS OBTAINED

FROM THE HOSPITAL THAT SHE HELD IN HER HAND.

E. DURING THE WEEK OF AUGUST 7, ABOUT THE 11TH, 1983, I MET WITH CONNIE RESHARD, THE PATHOLOGIST, LEROY RESHARD AND THE MORTICIAN AT THE PATHOLOGIST OFFICE.

THE MORTICIAN HAD BEEN CONCERNED THAT SOMETHING WAS WRONG ABOUT WHAT MY MOTHER DIED OF BECAUSE OF THE CONDITION OF THE BODY AND THE FACT THE HEART HAD BEEN REMOVED.

THE PATHOLOGIST EXPLAINED ABOUT THE ANEURYSM.

I HAD ONE QUESTION TO ASK: HOW BLOOD GOT INTO THE HEART SAC?

THE PATHOLOGIST EXPLAINED THAT THE ANEURYSM WAS LOCATED ABOUT AN INCH FROM THE HEART. THE SPLIT BULGED LIKE A CAR TIRE DOES WHEN IT SEPARATES, SPLIT, AND BLOOD FLOWED INTO THE SPLIT AREA. THE

BLOOD FLOWED BACK INTO THE HEART SAC CAUSING THE HEART NOT TO BEAT. THE SPLIT WAS LOCATED ONLY IN THE ASCENDING AORTA, UP TO THE TOP; IT HAD NOT TURNED DOWN. [DOWN THE ARCH TO THE DESCENDING AORTA OR OTHER BRANCHES].

MY SISTER CONNIE RESHARD, WAS CONCERNED THAT MOTHER'S HEART HAD BEEN REMOVED. THE PATHOLOGIST NEVER ANSWERED CONNIE. CONNIE WANTED TO SEE THE HEART BUT THE PATHOLOGIST SAID NO, IT WOULD UPSET HER. SHE ALSO WANTED TO HAVE TISSUE SAMPLES TESTED FOR DRUGS ADMINISTERED TO OUR MOTHER, BUT THE PATHOLIGIST [PATHOLOGIST] SAID TOO LATE BECAUSE THE ONLY THING HE HAD WAS HER HEART. HE SAID HE HAD NO TISSUE SAMPLES.

I WOULD BE HAPPY TO SUBMIT TO A POLYGRAPH TEST.[I ASKED IF HE WOULD SUBMIT TO A POLYGRAPH TEST IN ORDER TO USE THE SAME

AFFIDAVIT FOR USE BY STATE OF FLORIDA REGULATORS IN ADMINISTRATIVE PROCEEDINGS.]

SWORN BEFORE ME ON JULY 21, 1990.

/S/
HENRY P. CUNNINGHAM
NOTARY PUBLIC STATE OF NEW YORK
NO. 41-4841642
QUALIFIED IN QUEENS COUNTY
COMMISSION EXPIRES MARCH 30, 1991

/S/
JAMES RESHARD

****

AFFIDAVIT OF TOMMYE LEE CARR

ADDRESS: 4 STEWART AVENUE
HEMPSTEAD, NEW YORK 11550

JULY 21, 1990

I ACCOMPANIED MY NIECE, CONNIE RESHARD AND MY NEPHEW, LEROY RESHARD [IN AUGUST 1983 WAS THE ONLY TIME CONNIE AND LEROY TOGETHER EVER SAW A LAWYER ABOUT THEIR MOTHER'S DEATH] TO SEE A LAWYER ABOUT THE DEATH OF THEIR MOTHER, MINNIE LEE RESHARD.

I STAYED IN THE CAR.

AFTER THE MEETING IN THE CAR, CONNIE WAS

STRAIGHTENING THE HOSPITAL RECORDS AND FLIPPING THROUGH THEM. SHE SAID THAT THE PSYCHIATRIST REPORT WAS NOT THERE AND THE LAWYER HAD KEPT IT. LEROY COMMENTED THAT WE COULD GET IT THE NEXT DAY BECAUSE WE HAD TO COME BACK ABOUT THE PROBATE OF THE ESTATE. CONNIE SAID OKAY AND DID NOT GO BACK INSIDE AT THAT TIME FOR THE DOCUMENT. WE DROVE AWAY.

I WOULD BE HAPPY TO SUBMIT TO A POLYGRAPH TEST.

[AGAIN THE REASON FOR THE POLYGRAPH STATEMENT IS FOR SUBMISSION OF THE AFFIDAVIT TO AN ADMINISTRATIVE BODY, STATE OF FLORIDA REGULATORS.]

SWORN BEFORE ME ON JULY 21, 1990.

/S/

HENRY P. CUNNINGHAM
NOTARY PUBLIC, STATE OF NEW YORK
NO. 41-4841642
QUALIFIED IN QUEENS COUNTY
COMMISSION EXPIRES MARCH 30, 1991

/S/

TOMMYE LEE CARR

AFFIDAVIT BY CONNIE RESHARD

700 Seventh Street, S.W.

Washington, D.C. 20024

August 3, 1990

I CERTIFY, UNDER PENALTY OF PERJURY, THAT THE FOLLOWING STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

A. In early 1980, a Mr. Thomas Woods, attorney for the state of Florida Risk Management (Workmen Compensation) had demanded a psychiatric examination for my mother and that she had one. My mother, Minnie Lee Reshard had two injuries to her back while in the line of duty at SunLand Hospital ([a facility for retarded children which is now closed]). The State took the position that my mother had no further injury and that the pain she had

continued to experience [complain about] was all in her mind.

B. Some time about July 1983, my mother, Minnie Lee Reshard told me that she had been seeing the psychiatrist, Dr. David Moore, on a regular basis, from 1980. She stated that she did not wish to continue but had been forced to continue because the State of Florida Health and Rehabilitative Services Office of Disability Determinations made this psychiatric treatment, a condition of receiving certain benefits from the Social Security Administration.

C. During this conversation with my mother in July 1983, my mother told me that she was not just having psychotherapy, but that she was given psychiatric testing, written test, oral test and testing with puzzles, all of

which were related to her sanity. Because a review was now in process with respect to the social security benefits by HRS, she felt additional pressure to label her insane. My mother would die [on August 6, 1983], before I could look into this problem.

D. A second problem has presented itself, Dr. Moore, a defendant in this case, has withheld/destroyed the results of the administration of these psychiatric test and has refused to acknowledge their existence, despite Plaintiffs discovery request regarding the results of these test and that his treatment was directed to her sanity and not the treatment of her back injury as he has [now] stated in this court. That is, the stated reasons for her treatment was her back injury, but actual treatment was to prove her lack of

sanity. Dr. Moore administered two very potent antidepressant drugs, pamelor and prolixin, which are used to treat schizophrenia, from 1980 until her death. E. Leroy Reshard and James Reshard were given a partial set of hospital records from Tallahassee Community Hospital (TCH) which covered her stay there from August 2, 1983 until her death on August 6, 1983. In the records [I obtained from Leroy Reshard], Dr. Chokhawala prepared a clinical resume, all doctors are required to prepare one as a result of treatment of a patient in a hospital. This document was in [the] copy [of the hospital records of the decedent] that Leroy Reshard gave to Elwin Thrasher [in my presence], an attorney in Tallahassee, Florida during the week of August 14, 1983. This clinical resume covered several visits to

my mother beginning on August 2, 1983 at Tallahassee Community Hospital. Dr. Chokhawala had concluded that my mother had serious mental condition including the possibility of schizophrenia; the document was one page and typewritten.

F. After we [Leroy and I] left Elwin Thrasher's office, I noted that he had kept the document. We returned the next day to sign a contract for Mr. Thrasher to handle the probate work. ([I] forgot the report). Both Leroy and I had gone to see Thrasher, as I had recommended him because he had handled legal work for me in the past. My aunt Tommye Lee Carr accompanied Leroy and I to see Mr. Thrasher [on the first visit], but she had remained in the car. My concern about the clinical resume typewritten by Dr. Chokhawala arose again when on or about August 31, 1983, I was

concerned that the medical records given to my family were incomplete, first, because James had commented that the woman at the hospital was selective in copying items to give to them (according to Leroy, a Jenny Shepard) and second, because my mother they said Jerry Harris

****

****

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

CONNIE RESHARD AND LEROY RESHARD,

PLAINTIFFS,

VS. CASE NO. 85-7216

DR. EARL BRITT, ET AL.,

DEFENDANTS

_____/

THE DEPOSITION OF: ROSA LEE WALKER-VIRGIL

DATE: THURSDAY, JUNE 28, 1990

TIME: COMMENCED AT 5:00 P.M.

CONCLUDED AT 5:35 P.M.

Page 9, line 9 W. DAVIS, ATTORNEY FOR TCH: Let me ask you in general, over the time that she was there in the hospital up until the last time you saw he, did you notice any change in her condition that you could see"

WALKER-VIRGIL: Change like what?

DAVIS: Well, did she seem sometimes better or sometimes worse or less pain, more pain, sometimes happier or sadder? Did you see any change at all in her over the time she was there?

WALKER-VIRGIL: Not really.

DAVIS: When you were there in the room with her, did you ever see any kind of a medical event? Did you see her like -- I'm asking you, did you see her faint?

WALKER-VIRGIL: No, I didn't.

DAVIS: Did you see her have any evidence of any sickness?

WALKER-VIRGIL: Well, the Friday when I were there I spent most of the time with her. And she was awful tired and was more weak. But it's -- in other words, the doctor wanted her to get out of the bed and walk. So, I walked back -- there was a waiting room off from her room. And I walked with her back and forth and she just said I'm tired, and I helped her to get back in the bed.

DAVIS: What else do you remember about that Friday, anything else? I'd like you to probe your memory.

WALKER-VIRGIL: [discussion of hot night gown, irrelevant]

DAVIS: Yes, ma'am. Is there anything else that you remember about that Friday?

WALKER-VIRGIL: Well, the doctor -- the nurse gave her something to put under her tongue, I remember that.

Page 11, line 5

DAVIS: Yes, ma'am. Is there anything else that you remember about her or that day in particular that day, Friday?

WALKER-VIRGIL: Other than she kept complaining about --

DAVIS: Being sore in her chest?

WALKER-VIRGIL: No, she said it was hurting.

DAVIS: you're touching your chest?

WALKER-VIRGIL: In the area of her heart. She said it hurt. And she was so -- she

was very short of breath.

DAVIS: Were you -- I guess you were also there the day before on Thursday?

WALKER-VIRGIL: Just a little while, probably 15 minutes and I had to get my ride to go home.

DAVIS: When you were there on other days, did you see any nurses come in and give her any pill under her tongue or could you have the days -- are you absolutely sure?

WALKER-VIRGIL: I was just there a few minutes those other days because I didn't see them give anything that day, but they gave her something that Friday I was there because I spent more time with her.

****

****

TRANSCRIPT BY DR. ROBERT TAYLOR

TAKEN IN WASHINGTON, D.C. ON JULY 17, 1990

AT 444 NORTH CAPITOL ST., N.W.

BEFORE ACE FEDERAL REPORTERS, INC.

BEGINNING WITH PAGE 8, LINE 2, ENDING PAGE 9, LINE 22.

William Davis: Dr. Taylor, do you anticipate testifying in the trial in the case that I described earlier?

Dr. Taylor: Well, I'm not aware of the details of the case, the charges that have been levied. So, I'm really not aware of the nature of the case, except by your comments at the beginning of this deposition.

William Davis: The comments that I made on the record?

Dr. Taylor: Yes.

William Davis: Have you formed an opinion such that you are prepared to express an opinion today that any one of the defendants in this case is guilty of medical malpractice?

Dr. Taylor: I do not have an opinion.

William Davis: Could you tell me of the contacts that you have had with counsel for the plaintiffs, Ms. Connie Reshard, with regard to this matter?

Dr. Taylor: Several years ago, and I can't remember the exact year, probably '86 or 87' perhaps, or earlier, it has been that long, I was contacted by Ms. Reshard to review certain records relative to the death of her mother. I discussed those items with her and reviewed the records in her presence briefly, and I might add superficially, and suggested that she seek other experts in the area that I felt were appropriate, specifically cardiology and cardiothoracic surgery. But other than that contact, there has been no other contact, and specifically there has been no contact since those

dates in '86 or 87' until the last week or so.

William Davis: Prior to the last week or so did you provide her with any written reports?

Dr. Taylor: I can't recall that I did. It's possible that I might have back in those dates in '86 or 87'. I looked through my files yesterday and I could not find them, but I've moved from another office recently and they might have been misplaced. There is a possibility that I might have provided her with some information relative to the overall medical condition, but I don't recall that I did.

William Davis: You don't recall expressing an opinion to her that any of these defendants are guilty of medical malpractice, do you?

Dr. Taylor: That's a strong term "guilty" especially in Washington, but the determination of guilt would not be something that I would be an expert at giving. So my opinion would simply be the facts surrounding the medical . . . .

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AFFIDAVIT BY DR. REGINALD PENISTON, THORACIC SURGEON, WASHINGTON, D.C., SEPTEMBER 28, 1990.

1. In June 1986 I was approached by Ms. Connie Reshard who was referred to me by a respected colleague.

2. I was shown a chest x-ray and asked if I though it was normal. I replied that it did not look normal to me and further that if the patient had chest pains, that further testing was required.

3. Ms. Reshard then indicated that these were x-rays of her mother and that she had died abruptly and that she was informed by her mother's physician (Dr. Britt) that nothing could have been done. She then shared the medical records with me.

4. I showed the x-ray to two separate radiologists with the statement that this was a patient with chest pains. Both radiologist found the x-rays worrisome and abnormal regarding the aortic silhouette and freely offered the possibility of aortic dissection.

5. If these x-rays are interpreted as normal then one can easily miss a dissecting aneurysm. This has no bearing on the fact that such aneurysms can be successfully repaired.

6. If these x-rays had been interpreted with a greater degree of clinical

suspicion, then a CT Scan of the chest or an arteriogram would have been performed promptly and surgery would have been performed. The chances of survival would have been about seventy (70) percent.

7. The statement (if true) that nothing could have saved the patient is misrepresentative of both the facts of the case and is a misinformation which does not respect this family's loss.

8. Since the patient had recurrent chest pains while hospitalized and since the physicians were convinced that she had a neuropsychiatric problem they did not even entertain the diagnosis of dissecting aneurysm.

Signed by Dr. Peniston before a notary (Mattie L. Brown, District of Columbia on September 28, 1990. This statement had been submitted previously, unnotarized.

An earlier statement in July 1986 had also been made by Dr. Peniston.

****

**********AFFIDAVIT BY DR. MICHAEL CHILDRESS, RADIOLOGIST

WASHINGTON, D.C., SEPTEMBER 19, 1990

I have reviewed the three radiographic films made of Minnie Lee Reshard. One of the films appears to be a portable A-P (anteroposterior) exam and the date is not discernible on this film. The two other films appear to represent a routine chest exam (P-A, posteroanterior, and lateral films) obtained on 8-2-83.

Portable Exam: The patient is rotated toward the left posterior oblique position. The ectatic and unfolded aorta appears to be associated with enlargement of the cardiac silhouette. The descending aorta is indistinct but this could be

related to technique. A full inspiration was not obtained.

Routine Exam: The descending aorta appears distinct. The aortic dilation and unfolding displaces the trachea to the right. The paratracheal shadows are prominent which could be related to ectatic brachiocephalic vessels or thyroid enlargement. No pleural fluid or parenchymal consolidation identifiable. The cardiac and aortic changes are suggestive of systemic hypertension.

Impression: Ectasia and unfolding of the aorta are associated with enlargement of the cardiac silhouette and probable left ventricular enlargement. The appearance of the aorta is consistent with and suggestive of aortic dissection, especially chronic. The cardiac and aortic changes suggest the possibility of

systemic hypertension. Signed, Michael Childress and notarized.

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PHYSICIANS ORDERS, Plaintiff's Exhibit A-4, D.C. No. 85-7216 (R4-183-Exht. A-4)

(1) T_3, T_4, T7

(2) ESR

(3) Thyroid Scan

signed Dr. Earl Britt on August 4, 1983.

RESULTS OF INTERNATIONAL CLINICAL LABORATORIES, Plaintiffs Exhibit A-2 (R4-183-Exht. A-2)

Time Collected: 4:33 P.M. on August 4, 1983

Thyroid Profile:

T_3 RESIN UPTAKE:	**30.1**	**23%-32%**
T_4:	9.6	4.5-13.0
MCG/DL		
T_7:	2.9	1.0-4.3

Proof of Facts, 3d Series, Taber's Cyclopedic Medical Dictionary 16th ed., Lawyers Cooperative Publishing, Rochester, New York, ed. by Clayton L. Thomas, M.D. M. P. H.

Thyroid Function Tests: Tests for evidence of increased or decreased thyroid function including clinical physical examination, which is usually reliable, and a variety of reliable laboratory tests. Some of the more common tests are based on direct or indirect determination of the two thyroid hormones, and triiodothyronine (T_3) and tetraiodothyronine (T_4). Also frequently used are tests on radioactive iodine uptake by the thyroid. Id at 1864.

T_3 Triiodothyronine (a thyroid hormone)

T_4 Thyroxine (a thyroid hormone)

T_7 free thyroxin index

ESR: ELECTRON SPIN RESONANCE: A relatively new technique used in medical imaging that identifies atoms by their electron spin characteristics; erythrocyte sedimentation rate. Id. at 624. Erythrocyte: A mature red blood cell or corpuscle. Each is a non-nucleated, biconcave disk averaging 7.7. microns. Id. 620.

THYROID SCAN:

RADIOPHARMACEUTICALS: BALLINGER, P.W., MERRILL'S ATLAS OF RADIOGRAPHIC POSITIONS AND RADIOLOGIC PROCEDURES, 5TH ED. C.V. Mosby Company, St. Louis, 1982.

Radioactive chemicals either in the

form of individual elements or elements attached to other substances called carriers. They are used in testing the location, size, outline, or function of tissues, organs, vessels, or body fluids. The presence and location of radiopharmaceutical substances in the body are detected by special methods or apparatus that record the radioactivity being emitted. These compounds may also be used to treat certain diseases. Id. at 1553-1554.

RADIOPHARMACEUTICALS

I.

RADIONUCLIDE	**IODINE**
SYMBOL	^{123}I
PHYSICAL HALF-LIFE	13.3 HOURS
CHEMICAL FORM	SODIUM IODINE
DIAGNOSTIC USE	THYROID FUNCTION AND IMAGING

****

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT COURT OF FLORIDA, TALLAHASSEE DIVISION

RESHARD, PLAINTIFFS,

V. NO. 85-7216-WS

DR. BRITT, ET AL., DEFENDANTS.

_____/

MOTION TO QUASH TAKING OF DEPOSITIONS FROM EXPERT WITNESSES MOTION FOR PROTECTIVE ORDER Points and Authorities

A. Paragraph 3 of the Scheduling Order issued by this court on April 17, 1990 states the following:

"The parties are reminded that discovery depositions of experts expected to be called as witnesses at trial are subject to the provisions of Rule

26(b)(4)(ii)."

B. Rule 26(b)(A)(ii) states:

Trial preparation: Experts. Discovery of facts known and opinions held by experts, other wise discoverable under the provisions of subdivions (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(ii): Upon Motion, the court may order further discovery than the scope of discovery in (A)(i) by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate."

Case No. 92-1549

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

CONNIE C. RESHARD and LEROY RESHARD, etc.,

PETITIONERS;

v.

DR. EARL BRITT; DR. GEORGE BONK; DR. PANKAJ CHOKHAWALA; DR. DAVID MOORE; TALLAHASSEE MEDICAL CENTER, INC., d/b/a TALLAHASSEE COMMUNITY HOSPITAL,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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REASONS WHY THE PETITION SHOULD BE DENIED 11

1. The decision below does not "directly conflict" with that of the Court of Appeals for the Eighth Circuit in *Equal Employment Opportunity Commission v. Carter Carburetor*, 577 F.2d 43 (8th Cir. 1978), *cert. denied*, 439 U.S. 1081 (1979). 11

2. The decision below does not conflict with those of the Court of Appeals for the Ninth Circuit. 13

a) The Ninth Circuit does not require, as a prerequisite to dismissal, the imposition of prior sanctions and the giving of prior warnings. 13

b) The Trial Court explicitly discussed the adequacy of alternative sanctions, imposed prior sanctions, and gave prior warnings. 14

3. The decision below is consistent with those of this Court in *Chambers v. Nasco, Inc.*, 111 S. Ct. 2123 (1991), *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990), and *Insurance Corp. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694 (1982). 17

4. The decision below does not conflict with that of the Court of Appeals for the Seventh Circuit in *United States v. Reddick*, 620 F.2d 606 (7th Cir. 1980). 19

5. The issues Petitioners wish to litigate in this Court are meritless. .. 21

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Case No. 92-1549

IN THE
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October Term, 1992

CONNIE C. RESHARD, et al., etc.,

PETITIONERS;

v.

DR. EARL BRITT, et al.,

RESPONDENTS.

RESPONDENTS' JOINT BRIEF IN OPPOSITION

The Respondents, Dr. Earl Britt; Dr. George Bonk; Dr. David Moore; Dr. Pankaj Chokhawala; and Tallahassee Medical Center, Inc., d/b/a Tallahassee Community Hospital [hereinafter Tallahassee Community Hospital];[1] respectfully request this Honorable Court to deny the petition for the issuance of a writ of certiorari.

OPINION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit, in this case, is as follows:

PER CURIAM:

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[1] The identities of all the Parties are included in the style of the case. The parent company of Respondent Tallahassee Medical Center, Inc., is Hospital Corporation of America. Tallahassee Medical Center, Inc., has no subsidiaries that are not wholly owned. Sup.Ct.R. 29.1.

> The issues Appellant raises in this appeal are meritless. The district court committed no error, much less an abuse of its discretion, in (1) refusing to disqualify defense counsel; (2) refusing to grant the plaintiffs a default against the defendants; and (3) in dismissing plaintiffs' wrongful death action with prejudice. Every finding of fact complained of is well supported by the record, and the court properly applied the law to each such finding.
>
> AFFIRMED.[2]

Appendix to Petition for Certiorari at 4 [hereinafter cited as "Pet. App." followed by the appropriate page number].

STATEMENT OF THE CASE AND FACTS

1. Respondents' Statement: Adoption of Trial Court Order and Appellate Decision

The key Record item is the sixty-three page Order, Report and Recommendation of the United States Magistrate (R10-376), reproduced in the Petitioners' Appendix to Petition for Certiorari, at page 18 (marred, unfortunately, by Petitioners' "editorial" comments). That Report and Recommendation reflects extensive factual findings expressly "based upon documents filed in this case, answers to interrogatories,

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[2] Petitioners include "editorial" comments throughout their Appendix, some of which suggest that the Court of Appeals may have vacated its decision below, which was rendered on September 30, 1992. Appendix to Petition for Certiorari at 3-4. Petitioners' only basis for this suggestion is that the Mandate, which was issued on February 26, 1993, did not include the full text of the Court's previously issued *Per Curiam* pronouncement. It is clear, however, that the circuit court did not vacate its September 30th decision.

transcripts of depositions, orders entered by this court, affidavits, and statements made to this court by counsel for the parties in hearings before this court" (R10-376-16; Pet. App. at 37), and it is replete with citations to the balance of the Record. That Report and Recommendation was reviewed by, and adopted as the Order of, the District Court (R10-396; Pet. App. at 8), which thereupon entered the Order of Dismissal from which appeal was taken to the United States Court of Appeals for the Eleventh Circuit, where the District Court Order was reviewed and affirmed. Pet. App. at 1-4.

Accordingly, Respondents adopt that initial, twice-reviewed Report and Recommendation as their statement of the relevant facts; and Respondents incorporate it herein, by reference. Nevertheless, Respondents will recite here, in conclusory fashion, some of the more salient facts found below:

(1) The Petitioners, dating back to 1986, have "an extensive history of dilatory behavior" herein, which "continued unabated by the willful timing of baseless motions." R10-376-57; Pet. App. at 114.

(2) By the Petitioners' "numerous spurious motions to block discovery, unilateral cancellation of scheduled depositions, frivolous but lengthy appeals of every order entered by the magistrate, and finally, willful disobedience to this court's order;" Petitioners carried out a campaign, beginning in 1986, to hamper Respondents' efforts to discover the opinions of any

experts that might be presented by the Plaintiffs at trial. R10-376-57; Pet. App. at 113.

(3) Petitioners engaged in "unreasonable unilateral obstruction of discovery," by interposing objections that were "baseless." R10-376-19, 20; Pet. App. at 45-46.

(4) Petitioners made false statements of fact, in sworn answers to interrogatories, with respect to the nature and content of the expert-opinion testimony that they would present at trial. R10-376-53, 58; Pet. App. at 105, 114-16.

(5) Petitioner Connie Reshard testified falsely, on deposition, with respect to a number of substantive matters pertaining to Petitioners' expert witnesses. R10-376-53; Pet. App. at 105.

(6) Petitioner/Petitioners' Counsel knowingly made false statements to the Court, in the course of a hearing, upon which the Court and opposing counsel relied. R10-376-39, 53; Pet. App. at 82, 106.

(7) Petitioners willfully disobeyed a court order to make their two alleged expert witnesses available for deposition. R10-376-53, 54; Pet. App. at 106-107.

(8) Petitioners willfully attempted to obstruct the Trial Court by instructing a subpoenaed witness not to attend a court-ordered deposition. R10-376-53; Pet. App. at 106. *See also* R10-376-54 n.16 (pertaining to the uncontested statement of another expert witness, indicating that Petitioners also told him not to attend his court-ordered deposition, which the Trial Court indicated "would be another incident of willful obstruction of this court's order to Plaintiff's attorney.")

(9) The Petitioners filed a midnight Motion to Quash depositions not only "in bad faith as an intentional effort . . . to obstruct discovery," but also in an intentional effort "to cause needless expense to [the Respondents]." R10-376-36; Pet. App. at 113.

(10) The Petitioners have made false and demonstrably baseless statements of medical "fact," in an effort to bolster claims that Respondents had destroyed evidence. R10-376-10; Pet. App. at 26.[3]

(11) Petitioners have engaged in a "vindictive abuse of the adjudicative process," using it to engage in the "malicious accusation" of opposing counsel. R10-376-11, 12; Pet. App. at 28-29.

(12) Petitioners have engaged in the "willful distortion of the plain words of this court's orders . . . throughout the unfortunate history of this case." R10-376-17, n.4; Pet. App. at 40.

These and other findings and conclusions, and the Record upon which they are based, were subjected to a *de novo* review in the District Court (Chief Judge William H. Stafford, Jr., presiding), which Court thereafter adopted them as its own. Petitioners appealed to the Court of Appeals, where the Record was again

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[3] Wholly immaterial to the pending Petition, but interspersed throughout it, are numerous statements pertaining to the human anatomy, or to other medical matters, that are either false or misleading. For example, Petitioners improperly use the terms "dissecuon," "aneurysm," and "rupture" interchangeably, in order to suggest that others, including a non-party pathologist, have made inconsistent statements and are therefore guilty of fraud. Petition at 13, 14. Likewise, they falsely suggest that the human thyroid is located in the chest. *Id.* at 19.

reviewed, in light of the actions taken by the Trial Court and also in light of Petitioners' attacks on opposing parties, opposing counsel, and court personnel, attacks which characterize the Petition here.

Concluding this appeal, the Court of Appeals for the Eleventh Circuit, in an unpublished *per curiam* decision, *Reshard v. Britt*, 976 F.2d 742, *reh'g en banc denied*, 981 F.2d 1264 (11th Cir. 1992), held that the Trial Court findings were fully sustained by the Record, that those findings provided a sufficient basis for the action taken, and that Petitioners' appellate assertions were "meritless." Pet. App. at 4.

2. Petitioners' Statement: Continued Distortion and Personal Attack

For the most part, Petitioners omit the material facts, and include immaterial allegations, in their Petition. Respondents resist the temptation to "pick apart," in this response, those baseless and immaterial charges, many of which relate to the "merits" of the Petitioners' underlying tort claim: Although they are largely and fundamentally false, they are also irrelevant.

With respect to what *is* material, Petitioners seek to avoid the Record, as can be gleaned from the Petition itself. They have mischaracterized the findings below;[4]

---

[4] Petitioners assert that sanctions were imposed "because Plaintiffs failed to attend [court-ordered] depositions," Petition at 31, and that this "failure to appear for the depositions were [sic] justified." *Id.* at 32. However, as is clear from Petitioners' Appendix, the sanctions were imposed for a host of improprieties, including lying to the court and opposing counsel, Pet. App. at 77-84, 106; enticing opposing counsel to travel to court-ordered depositions, knowing that

and they have trivialized the Trial Court's findings by inserting "editorial comments" (such as, "not so" and "not true") throughout the orders contained in Petitioners' Appendix. *See, e.g.*, Pet. App. at 39-41.

Indeed, Petitioners seek even to discredit their own testimony and argument below. For example, they argue that "[t]he factual findings . . . with regard to Connie Reshard's testimony was [sic] clearly in error," Petition at 57,. but that "Connie Reshard has not reviewed her deposition since it was not signed [by her] in compliance with Rule 32(b) and (e), Fed.R.Civ.P. Pet. App. at 131." *Id.* at n.17.

Ultimately, when Petitioners wish to avoid what they presented and argued at hearings before the Trial Court, they simply call the Record a lie and the Court Reporter a liar. The Petitioners mount this accusation, before this Honorable Court, in "blanket" fashion, covering all contingencies:

> The alleged finding that Connie Reshard waived her rights is erroneous in fact and law. *Any* statements *said* to be in support of that contention which are contained in the transcript of the June 29, 1990 proceeding before Magistrate Sherrill demonstrate the material alteration of a transcript by [Court Reporter] Paul Rayborn.

Petition at 56. (footnote omitted)(emphasis added).

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they would be unilaterally "cancelled" by Petitioners, Pet. App. at 85-91; and advising deponents that they need not comply with the court's subpoena. Pet. App. at 98-106.

However, there is no record basis for this charge, nor was the "issue" ever presented to the Trial Court.[5]

SUMMARY OF ARGUMENT

There are no special or important reasons for granting a Writ of Certiorari in this case.

Contrary to Petitioners' assertions, there is no conflict among the various circuit courts of appeals with respect to the application of the abuse-of-discretion standard in reviewing the dismissal of an action, as a sanction, pursuant to Federal Rules of Civil Procedure 37, 41 and 16. Moreover, this Court has previously and clearly outlined the factors that should be considered when conducting such an appellate inquiry, and the law of the Eleventh Circuit--as articulated elsewhere and as

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[5] In other litigation, Petitioners' counsel has made substantially similar accusations. Thus, in her Petition for Writ of Certiorari filed in this Court in *Reshard v. Comm. on Admissions for Dist. of Columbia Court of Appeals* (Case No. 92-1292), *cert. denied*, 61 U.S.L.W. 35 (U.S. Mar. 23, 1993), Petitioner/Petitioners' counsel acknowledged that the Committee on Admissions to the Bar had expressed concerns

> "about allegations of bias and/or dishonesty made [by Connie Cornelia Reshard] against [United States District Court] Judge John Garrett Penn, and court reporters Harry Deustch and S. Popejoy, and what appeared to be allegations by [her] of bad faith on the part of Judge W. Bryant all made during the course of *Reshard v. Burnley*, U.S.D.C. D.C. Civ. No. 87-2794 JGP . . . ."

Id., Petition for Certiorari at 6, n.2. *See also*, The Recommendation of the Committee on Admissions, *id.*, Appendix, which reports that "in cases [Petitioners' counsel] litigated *pro se*, she has made allegations of bias and/or dishonesty against two Federal judges and three court reporters." *Id.* at 28.

applied in this case--is consistent with that determined by this Court and applied in the other Circuits. Finally, because reviewing the dismissal of an action, as a sanction, is inevitably a fact-intensive inquiry, each such case is arguably unique. In any event, the boldly egregious and stubbornly continuous misconduct of Petitioners herein, as shown by the Record, may well be unprecedented.

From the outset of this case, the Petitioners, initially in a *pro se* capacity and later through counsel (Petitioner Connie Reshard), have engaged in a pattern of increasingly outrageous misconduct--ultimately including the willful violation and deliberate obstruction of court orders. Nevertheless, the Trial Court exhibited appropriate restraint and yet also repeatedly urged Petitioners to permit discovery and warned that severe sanctions would be imposed if the misconduct continued. But, rather than cooperating in discovery, Petitioners concocted and carried out a strategy that involved misrepresentation of their evidence and the frustration of Respondents' efforts to discover the truth. The tactics utilized by Petitioners included the unilateral "cancellation" of depositions; the filing of numerous, baseless objections, motions, and appeals; diversionary, baseless attacks on opposing counsel and parties; and, ultimately, lying to the court and to opposing counsel. As found below, some of these actions were taken in a vindictive spirit aimed at causing maximum damage and waste to Petitioners' opponents.

Ultimately, Petitioners were caught having lied to opposing counsel and to the Court itself, and caught having advised subpoenaed witnesses not to appear. This having been disclosed, and following ample notice to Petitioners, the Magistrate conducted a full and fair evidentiary hearing on motions for sanctions, at which Petitioner Connie Reshard appeared, as counsel on behalf of the Petitioners. Based upon that hearing and a comprehensive review of the Record, the Magistrate entered a lengthy, sixty-three page Order, Report and Recommendation, recommending dismissal. In the Report, the Magistrate carefully and expressly considered whether a lesser sanction would be adequate to serve the purposes of the various Rules implicated by the misconduct; and concluded that, on these facts, dismissal was appropriate and, indeed, required. Petitioners were granted extensive time in which to file objections to the Report and Recommendation. Objections were filed, the presiding District Judge conducted a *de novo* review, and the Trial Court ultimately concluded that dismissal was the appropriate sanction under the circumstances.

On direct appeal, a panel of the Court of Appeals for the Eleventh Circuit reviewed the Record, and concluded that the Trial Court committed "no error, much less an abuse of discretion," and that Petitioners' contentions were "meritless."

The decision below is entirely consistent with the decisions Petitioners cite in the Petition for Certiorari, the case was correctly decided, and the Petition for Certiorari should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision below does not "directly conflict" with that of the Court of Appeals for the Eighth Circuit in *Equal Employment Opportunity Commission v. Carter Carburetor*, 577 F.2d 43 (8th Cir. 1978), *cert. denied*, 439 U.S. 1081 (1979).

In *Carter Carburetor*, the trial court ordered sanctions against the EEOC, pursuant to Rule 37(b), for allegedly refusing to fully answer certain interrogatories. On appeal, however, the court of appeals held that the trial court had abused its discretion, because the "record [was] clear" that "the dilatory tactics of Carter Carburetor . . . [were] at least the equal of the tactics of the EEOC," and because of the "highly irregular" procedures leading to the sanctions order. *Id.* at 49. In *Carter Carburetor*, the motion for sanctions was filed without a prior motion to compel answers to the interrogatories, and the sanctions order was entered following "an *ex parte* letter from Carter Carburetor and without [the district court] ever hearing from the EEOC." *Id.* Moreover, the EEOC had in fact attempted to answer Carter Carburetor's interrogatories, and it was Carter Carburetor's failure to permit discovery that effectively precluded the EEOC from providing complete answers. *Id.* at 47 n.2.

The Eleventh Circuit's decision herein is entirely consistent with that of the Eighth Circuit in *Carter Carburetor*. First, Petitioners' allegations that Respondents concealed or destroyed evidence, and

engaged in discovery abuses, are just that: mere allegations; and they are entirely without support in the Record. Moreover, Petitioners' misconduct far exceeds the minor discovery violations found in *Carter Carburetor*. Here, the Record amply supports the Trial Court's findings that Petitioners willfully violated and deliberately obstructed orders of the court, knowingly made false representations to the court, and, essentially, perjured themselves in interrogatories and on deposition.

Second, in contrast to the "irregular procedures" employed by the trial court in *Carter Carburetor*, the District Court in the instant case afforded Petitioners a full and fair evidentiary hearing, following ample notice of allegations set forth in extensively documented motions for sanctions, to which written responses had been received from Petitioners. Petitioner Connie Reshard (as Counsel for Petitioners) represented Petitioners at the hearing, and every item of evidence and information which Petitioners sought to share with the Court was duly received and considered. Thereafter, the Magistrate entered a sixty-three page Order, Report and Recommendation, thoroughly explaining (with citation to pleadings and testimony in the Record) the basis for recommending dismissal. United States District Judge Stafford, with the full benefit of Petitioners' objections, conducted a *de novo* review of the Record, prior to entering the Final Judgment of Dismissal. There is no suggestion, in the Record, that the procedures below were in any sense "irregular."

Thus, the Eleventh Circuit's decision herein does not conflict with that of the Eighth Circuit in *Equal Employment Opportunity Commission v. Carter Carburetor*, 577 F.2d 43 (8th Cir. 1978), *cert. denied*, 439 U.S. 1081 (1979).

2. The decision below does not conflict with those of the Court of Appeals for the Ninth Circuit.

Petitioners suggest that the decision below conflicts with certain decisions of the Court of Appeals for the Ninth Circuit, arguing that the Ninth Circuit requires, of the trial courts, both the imposition of prior sanctions and a clear warning of the possibility of dismissal, in order to sustain a dismissal sanction.

However, Petitioners misstate the law of the Ninth Circuit; there is no pertinent conflict between the Ninth and Eleventh Circuits; and, in any event, prior sanctions were imposed, and prior warnings were given, in the Trial Court.

a) The Ninth Circuit does not require, as a prerequisite to dismissal, the imposition of prior sanctions and the giving of prior warnings.

In determining whether a trial court has abused its discretion in dismissing a case as a sanction, the Courts of Appeals for both the Ninth Circuit and the Eleventh Circuit *consider*, as one factor of several, whether the trial court considered lesser sanctions. *See, e.g., Rubin v. Belo Broadcasting Corp. (In re Rubin)*, 769 F.2d 611, 617 (9th Cir. 1985); *Aztec Steel Co. v. Florida*

Steel Corp., 691 F.2d 480, 481-82 (11th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983). *Both* Courts of Appeals prefer that the trial court explicitly discuss, on the record, the reasons why lesser sanctions are not adequate. *See, e.g., Malone v. United States Postal Service*, 833 F.2d 128, 132 (9th Cir. 1987), *cert. denied sub nom. Malone v. Frank*, 488 U.S. 819 (1988); *Mingo v. Sugar Cane Growers Co-Op.*, 864 F.2d 101, 102 (11th Cir. 1989). Likewise, in making their appellate determinations, *both* Courts *consider* whether prior sanctions were imposed and whether prior warnings were given. *See, e.g., Malone*, 833 F.2d at 132; *Jones v. Graham*, 709 F.2d 1457, 1462-63 (11th Cir. 1983).

But, contrary to Petitioners' assertion, the Ninth Circuit does not *require* that the trial court impose prior sanctions and explicitly warn that dismissal might later be imposed. For example, in *Malone*, a panel of the Ninth Circuit affirmed a dismissal sanction, notwithstanding the absence of an explicit warning. The court stated:

> A plaintiff can hardly be surprised by a harsh sanction in response to willful violation of a pretrial order. Rule 16(f) and 41(b) explicitly state that dismissal may be ordered for violation of a court order.

Malone, 833 F.2d at 133. In this case, the Petitioners willfully violated, and even obstructed, court orders.

b) The Trial Court explicitly discussed the adequacy of alternative sanctions, imposed prior sanctions, and gave prior warnings.

In the instant case, the Trial Court *did*, explicitly and thoroughly, consider the adequacy of lesser sanctions, including an award of expenses and fees; an order of contempt; an order striking pleadings, defenses or claims; and an order excluding expert testimony. However, having carefully considered lesser sanctions, the Trial Court concluded that lesser sanctions would be inadequate, and it explained the reasons why this conclusion was reached. Pet. App. at 115-118; R10-376-58.

Additionally, Petitioners were repeatedly warned that serious sanctions would be imposed if their misconduct continued, and prior sanctions were imposed. Early in the case, in August 1986, the Trial Court noted its concern that "Plaintiffs [Petitioners] may be slowing the progress of this litigation," and the Court thus sanctioned Petitioners by ordering that no further extensions of discovery would be permitted, absent extraordinary cause. R2-111; Pet. App. at 46. In that same order, the Trial Court found that the "Plaintiffs [Petitioners] had not made a good faith effort" to comply with a previously entered discovery order; and the Court thus warned Petitioners that "*Searock* [*v. Stripling*, 736 F.2d 650 (11th Cir. 1984)] authorizes the court to impose sanctions if a party fails to make a good faith effort to produce documents as ordered by the court." R2-111-6.

Following remand of the case, after the Petitioners' interlocutory appeal to the Court of Appeals for the Eleventh Circuit, the Trial Court entered an order, in June 1990, stating that

> Sanctions will not be awarded as a result of this round of discovery problems because some of the problems seem to have occurred some years in the past. Since this case is now in active discovery and will be closely monitored by the court, it is hoped that sanctions will not be needed to keep this case on track.

R5-220.

At the same time, however, the Trial Court sanctioned Petitioners, by granting Respondent Tallahassee Community Hospital's motion to strike a portion of a pleading filed by Petitioners, wherein Petitioners falsely charged opposing counsel with dishonestly misleading the Court regarding a discovery matter. R5-220-7.

The Trial Court also took measures designed to encourage Counsel for Petitioners to communicate, as required by local rule, with Counsel for the Respondents--who were trying to coordinate discovery. For example, in June 1990, the Trial Court found it necessary to enter an order requiring counsel for Petitioners to file, with the Court, a telephone number where she could be reached, and to return telephone calls. R5-224.

At a hearing held on June 29, 1990, the Magistrate denied the Petitioners' Motion to Quash the depositions of Petitioners' purported expert witnesses, and again warned that, if the on-going discovery difficulties continued, he would hold an evidentiary hearing and "recommend [to Judge Stafford], one way or the other, where the hammer will fall." R14-19. As the

Magistrate later stated, in his Report and Recommendation, "[t]he language used was as forceful as the court could make it." Pet. App. at 74.

In July 1990, Judge Stafford affirmed certain discovery orders, and remanded the case to the Magistrate for consideration of a Respondent's motion for an award of attorneys fees and costs, as a sanction, against the Petitioners. R5-251. Shortly thereafter, in August 1990, the Trial Court found Petitioners' appeal of yet another discovery order to also be "frivolous," and admonished Petitioners that "[t]he court regards such dilatory tactics with disfavor." The Trial Court "cautioned [Petitioners] that this court's patience is not inexhaustible" and cited *Griffen v. Swim-Tech Corp.*, 722 F.2d 677 (11th Cir. 1984), in which the Court of Appeals affirmed a default judgment entered as a sanction for a defendants' delay and violations of court orders. R7-293.

Despite the repeated warnings and sanctions, the Petitioners persisted in their misconduct. As the Trial Court found, "the court's entreaties, as well as the court's orders, were ignored by Plaintiffs' [Petitioners'] counsel." Pet. App. at 85; R10-376-41.

3. The decision below is consistent with those of this Court in *Chambers v. Nasco, Inc.*, 111 S. Ct. 2123 (1991), *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990), and *Insurance Corp. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694 (1982).

Petitioners argue that the decision of the Court of Appeals below is inconsistent with that in *Chambers v. Nasco, Inc.*, 111 S. Ct. 2123 (1991). However, this

argument is based on Petitioners' assertion that the Court in *Chambers* "found that outright dismissal of [the] lawsuit [wa]s too severe [a] sanction," despite evidence of false statements to the court. Petition at 42. But, the *Chambers* Court made no such finding: The sanction at issue in *Chambers* was not a dismissal, but an award of attorney's fees pursuant to the trial court's inherent power. The Court affirmed, reasoning that, because "outright dismissal of a lawsuit . . . is within the court's discretion[,] . . . the 'less severe sanction' of an assessment of attorney's fees is undoubtedly within a court's inherent power as well." *Id.* at 2133.

Petitioners also contend that the Eleventh Circuit's decision is inconsistent with this Court's decision in *Insurance Corp. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694 (1982), wherein the Court recognized that a sanction imposed pursuant to Rule 37(b)(2) must be "just." Petitioners' extensive history of egregious misconduct, coupled with the prior warnings given Petitioners, clearly belies any claimed conflict between what is "just" and the decision of the Court of Appeals in this case.

Finally, Petitioners assert that the Court of Appeals' decision in this case is inconsistent with the Court's decision in *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990). Yet, the decision in *Lytle* did not involve imposition of a sanction. Respondents can

identify nothing in *Lytle* that significantly relates to the issues Petitioners raise here.[6]

4. The decision below does not conflict with that of the Court of Appeals for the Seventh Circuit in *United States v. Reddick*, 620 F.2d 606 (7th Cir. 1980).

Taking a procedural tack, the Petitioners next assert that the decision below conflicts with that of the Court of Appeals for the Seventh Circuit in *United States v. Reddick*, 620 F.2d 606 (7th Cir. 1980). Petitioners apparently misapprehend the holding in *Reddick*, however, inasmuch as that decision seemingly has no application whatsoever to the procedural claim raised by Petitioners. Regardless, there is certainly no conflict between *Reddick* and the decision below.

Nevertheless, citing *Reddick*, Petitioners argue that District Judge Stafford lacked jurisdiction to review the Magistrate's Report and Recommendation of Dismissal, because Petitioners had requested that the Magistrate first reconsider his recommendation. The District Court, before undertaking its review, had entered an order explaining that Petitioners' unauthorized motion for reconsideration would be treated as Petitioners' objections to the Magistrate's Report. The Order also gave Petitioners additional time to file any additional objections. R10-389.

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[6] *Lytle* involved the collateral-estoppel effect of a district court's determination of issues common to equitable and legal claims; where the court resolved the equitable claims first, solely because it erroneously dismissed the legal claims. 494 U.S. at 547.

Petitioners assert that the *Reddick* Court held that "a motion [requesting a magistrate] to reconsider a proceeding [sic] which reaches the merits of the litigation is a Rule 59(e) motion to amend which tolls the appeals process [from the magistrate] to the district judge." Petition at 61. The *Reddick* Court held no such thing: In *Reddick*, a criminal defendant attempted to appeal directly to the court of appeals, from a magistrate's refusal to authorize payment for an investigator. The court of appeals thereupon observed that, because the Federal Magistrates Act, 28 USC § 636(b)(1)(A), expressly provides that a district court judge may reconsider a magistrate's ruling on a non-dispositive, pretrial matter, a party may not take a *direct* appeal, to a circuit court, from such an order. Thus, the *Reddick* court held that the appellant *waived* the right to appeal to the court of appeals, by not seeking intermediate review by the district court judge. Neither this holding, nor the *Reddick* Court's reasoning, conflicts with the decision of the Court of Appeals below.

Moreover, and wholly apart from any claimed "conflict" among the circuits, Petitioners' procedural argument is frivolous. As this Court recognized in *United States v. Raddatz*, 447 U.S. 667 (1980), "the magistrate acts subsidiary to and only in aid of the district court," with "the entire process tak[ing] place under the district court's *total control and jurisdiction*." 447 U.S. at 681 (emphasis added). *See also*, *Thomas v. Arn*, 474 U.S. 140, 154 (1985) ("[t]he district judge has jurisdiction over the case at all times.").

5. The issues Petitioners wish to litigate in this Court are meritless.

Petitioners claim that dismissal of this action violated Petitioners' fifth amendment right to due process of law. This claim is, as the Court of Appeals found, "meritless." Petitioners had multiple and ample warnings of the possibility of severe sanctions. Petitioners were given ample notice and opportunity to be heard at an evidentiary hearing on the motions for sanctions. Petitioners were represented by counsel--Petitioner Connie Reshard--at the hearing. The Magistrate's findings and conclusions have been reviewed twice--once on a *de novo* basis by the District Judge (who adopted the findings), and again by the Court of Appeals. The Record amply supports the Trial Court's findings of a long pattern of egregious misconduct by Petitioners (including deliberate misrepresentations to the Court and willful violation and obstruction of court orders), all of which was designed to, and did, greatly prejudice the Respondents.[7]

Petitioners claim that "restriction of material evidence which would contradict certain factual findings and conclusions of law with respect to discovery abuses is inconsistent with due process of law." Petition at 37-38. Petitioners thus seem to contend that the Trial Court refused to receive and consider evidence that Petitioners suggest they attempted to introduce at the

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[7] The Magistrate explicitly considered the extent to which Petitioners' misconduct prejudiced the Respondents, and found that prejudice to be "great." App. 113-114; R10-376-57.

hearing on the motions for sanctions. Petition at 56-57. As another "due-process" claim, Petitioners also suggest that the Trial Court somehow failed to address Petitioners' allegations of destruction and concealment of evidence, and of discovery abuses, by the Respondents. Petition at 54-56.

These contentions and suggestions are entirely without support in the Record. Petitioners did repeatedly make unsupported allegations of misconduct on the part of Respondents, but those allegations frequently were rooted in an apparent misunderstanding of civil procedures,[8] were based entirely on a record that revealed the allegations to be specious,[9] or were simply

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[8] For example, in August 1986, Petitioners accused counsel for one Respondent with noticing the depositions of Petitioners' witnesses in "bad faith," merely because deposition subpoenas were not served on the witness prior to the filing of the Notice. R2-107.

[9] *See, e.g.*, Pet. App. at 28, where the Trial Court found that Petitioners' Counsel had "falsely" and "maliciously" accused Counsel for Respondent of deliberately misleading the Trial Court in a document filed with the Court. The Court found that the accusation was "contrary to the written record in this court," where the allegedly misleading claim was said to have been made: "Counsel for [Respondent] TCH clearly made no such claim" as was alleged by Petitioners. As the Trial Court stated, regarding a related matter,

> Like other matters asserted in this case, Plaintiffs [Petitioners'] allegations as to what the court "found" in doc. 220, are false. And like all that has been set forth above, after running the rabbit trail through the documents, the falsity of the assertion is eventually discovered.

Pet. App. at 34.

never placed in issue.[10] In nearly every instance where such allegations *were* placed in issue, the Petitioners simply failed to present competent evidence to support a finding in their favor, with respect to these allegations. Pet. App. at 19-36 (Order ruling on Petitioners' "Motion to Vacate Findings of Fact").[11] *See also, id.* at 93-94; 95 ("Plaintiffs' [Petitioners'] charge is accompanied by no supporting evidence"). In other instances (also not material herein), the Trial Court did hold hearings and determine facts.[12]

At the hearing on the motions for sanctions held on December 6, 1990, Petitioners sought to introduce only one item, a letter from a purported expert witness. That item was received and made a part of the Record, in connection with the motions, R18-90, and no other documents were offered or proffered by Petitioners, *in*

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[10] For example, the Petitioners *never* sought production, from any Respondent, of their decedent's heart; let alone did they ever move to compel its production.

[11] In that Motion, Petitioners contended that the Magistrate had made binding findings of fact with respect to these matters, and requested the Magistrate to vacate its prior findings of fact. R9-344. Paradoxically, Petitioners now contend that the same allegations were never addressed.

[12] For example, the Trial Court held an evidentiary hearing on Petitioners' Motion to Disqualify Defense Counsel and for Default Judgment, made detailed findings of fact, and denied said motion. R4-186; R7-287.

camera or otherwise.[13] Petitioners' contention that evidence, allegedly in Petitioners' favor, was arbitrarily refused, depriving them of property without due process of law, is directly contradicted by the Record.

The Petition herein, including the Appendix, reveals barely "the tip of the iceberg" of this most unfortunate case. Underneath, there lies a massive, morassy Record reflecting litigious viciousness and misconduct of the rankest order, perpetrated in and upon the courts below for years, by the Petitioners. However, after much patient cajoling, and after clear and stern warning, the Trial Court saw fit to terminate this unseemly process, only after the Petitioners engaged in clearly contemptuous behavior.

The Trial Court reached this determination lawfully, carefully, and after affording due process; and the appellate court found the ensuing appeal to be meritless. Respondents respectfully request that this Court spare the parties, the courts below, and--indeed--the judicial process, continued abuse at the hands of these Petitioners. This case is not worthy of discretionary review; it is worthy of dismissal, as was properly determined and affirmed below.

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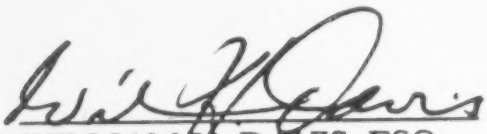
[13] Indeed, counsel for Respondent Dr. Britt specifically requested that certain enclosures, that allegedly accompanied the letter, also be introduced. R18-92. However, Petitioners objected; and the Magistrate received the letter without the enclosures, pursuant to Petitioners' request. In any event, the subject letter relates indirectly to only one of many findings upon which the sanction order was based.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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